Hon. Benjamin H Settle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

1LT EHREN K. WATADA, Petitioner, v. LT.COL. JOHN HEAD, Military Judge, Army trial Judiciary, Fourth Judicial District; LT. GEN. CHARLES JACOBY, Convening Authority, Ft. Lewis, Washington, Respondents.	No. C07-5549-BHS EXCERPTS OF RECORD OF JOINT APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

First Lieutenant Ehren K. Watada, Petitioner,	)	**JOINT APPENDIX**
The United States of America, Lieutenant Col. John M. Head, Lieutenant Gen. Charles Jacoby,	)	USCA No. ______________
	)	ARMY MISC NO. 20070834
Respondents.	)	

JOINT APPENDIX

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Defense Motion to Dismiss
Based Upon Double Jeopardy
(AE XXVII - ROT II - issued July 11, 2007)

Two authenticated Records of Trial (ROT I and ROT II) were filed with the Army Court of Criminal Appeals in this matter. ROT I pertains to events culminating in the declaration of mistrial on February 7, 2007. ROT II pertains to events following the declaration of mistrial, and culminating with the Article 39(a) session on July 6, 2007, and the written orders issued by the military judge following that session.

**RELEVANT MATTERS FROM THE RECORD
FOR THE COURT'S ATTENTION [Rule 24(f) - (Interim)**

17. Trial Transcript Pages 125-149; 178; 243-262; 353-379 (ROT I)

18. Trial Transcript Pages 51-95; 180-187 (ROT II)

19. Charge Sheet - AE XV (ROT I)

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21. AE V (ROT II) - Motion for Disqualification of Military Judge

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23. AE XXI (ROT II) - Motion to Dismiss All Charges on Grounds of Double Jeopardy

24. AE XIX (ROT II) - Response to Motion to Dismiss All Charges on Grounds of Double Jeopardy

25. AE XXII (ROT II) - Stipulation of Fact [Limited to Article 39(a) Session]

26. AE XXV (ROT II) - Notice of Appeal to the ACCA [filed at Article 39(a) Session on July 6, 2007]

27. AE XXVI (ROT II) - Defense Proposed Instructions (submitted to trial court on February 5, 2007)

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
HOLDEN, HOFFMAN, SULLIVAN
Appellate Military Judges

First Lieutenant EHREN K. WATADA, Petitioner
v.
Lieutenant Colonel JOHN M. HEAD,
and
Lieutenant General CHARLES H. JACOBY,
and
The United States Army
and
The United States of America
Respondents

ARMY MISC 20070834

ORDER

WHEREAS, in a series of pleadings filed with this Court,* Petitioner first requested, *inter alia*, dismissal for violation of the Double Jeopardy Clause of the United States Constitution and Article 44, Uniform Code of Military Justice, 10 U.S.C. § 844 [hereinafter UCMJ];

WHEREAS, after our denial of the initial requested relief as premature, Petitioner unsuccessfully moved at trial to dismiss;

WHEREAS, Petitioner subsequently moved, in the form of a request for reconsideration, that we decide the Double Jeopardy claim on its merits;

WHEREAS, Petitioner has requested a stay in trial proceedings and other extraordinary relief, oral argument before our court, and leave to file a response to Respondent's most recent filing entitled, "Initial Response in Opposition";

WHEREAS, Petitioner on 27 August 2007 moved for expedited decision on the pending defense motions in this case.

NOW, THEREFORE, IT IS ORDERED:

That the Motion for Reconsideration is GRANTED to the extent that we decide on the merits the motions to dismiss, stay, or grant other extraordinary relief;

* *See also* ARMY MISC 20070535

WATADA – ARMY MISC 20070834

That the Motion for Leave to File Response to Respondent's "Initial Response in Opposition" is GRANTED and said Response has been considered by this court;

That the Motion for Expedited Decision is GRANTED.

That all remaining motions are DENIED. We have reviewed the findings of fact and conclusions of law issued by the trial court and find the military judge did not abuse his discretion by granting the mistrial. *See United States v. Diaz*, 59 M.J. 79, 90 (C.A.A.F. 2003). "A military judge has 'considerable latitude in determining when to grant a mistrial.'" *Id.* (quoting *United States v. Seward*, 49 M.J. 369, 371 (C.A.A.F. 1998)). "This Court will not reverse the military judge's decision absent clear evidence of abuse of discretion." *Id.* (citing *United States v. Dancy*, 38 M.J. 1, 6 (C.M.A. 1993); *United States v. Rushatz*, 31 M.J. 450 (C.M.A. 1990)). Further, we find no violation of the Double Jeopardy clause or Article 44, UCMJ, and decline to dismiss, stay, or further delay the proceedings.

DATE: 28 August 2007

FOR THE COURT:

MALCOLM H. SQUIRES, JR.
Clerk of Court

CF: JALS-CR2
JALS-GA
Petitioner
Respondents

UNITED STATES V. 1LT EHREN WATADA, U.S. ARMY
EXHIBITS MARKED

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NO WITNESSES WERE CALLED

UNITED STATES	)	PRETRIAL AGREEMENT
v.	)	
WATADA, EHREN K. 1LT, United States Army HHC, I Corps Fort Lewis, WA 98433	)	29 January 2007

1. I, 1LT EHREN K. WATADA, the accused in a court-martial now pending, have examined the charges preferred against me, and all of the supporting evidence thus far provided by the government. After consulting with my defense counsel, Eric Seitz and CPT Mark Kim, and being fully advised of my rights, I hereby enter into the following Pretrial Agreement.

2. In exchange for the Government agreeing to dismiss Specifications 2 and 3 of Charge II, I agree to the following:

a. I agree to stipulate to the authenticity and admissibility of the facts stated in the attached Stipulation of Fact. This Stipulation of Fact may be used pursuant to this agreement for any purpose associated with the pending court-martial against 1LT Watada.

b. I further understand that upon the Court accepting the Stipulation of Fact into evidence, the Government will dismiss Specifications 2 and 3 of Charge II without prejudice to ripen into prejudice upon completion of trial proceedings.

3. This agreement originated with me, and no person or persons have made any attempt to force or coerce me into making this offer to stipulate.

4. My defense counsel has advised me of the meaning and effect of this agreement, and I understand the meaning and effect thereof.

5. I further understand that this agreement may become null and void upon the occurrence of any of the following events:

a. failing to agree upon the contents of the Stipulation of Fact with the trial counsel,

APPELLATE EXHIBIT XXIII (23)

b. my withdrawal from the agreement prior to trial, so long as the withdrawal is approved by the military judge.

c. the refusal of the military judge to accept the Stipulation of Fact.

EHREN K. WATADA
1LT, U.S. Army
Accused

ERIC SEITZ
Defense Counsel

MARK KIM
CPT, U.S Army
Military Defense Counsel

The foregoing agreement is (accepted) ~~(not accepted)~~.

DATE: 29 Jan 07

JAMES M. DUBIK
Lieutenant General, USA
Commanding

UNITED STATES ARMY
FOURTH JUDICIAL CIRCUIT

UNITED STATES	)	
	)	
v.	)	
	)	STIPULATION OF FACT
EHREN K. WATADA	)	
First Lieutenant, U.S. Army	)	
HHC, Special Troops Battalion, I Corps	)	29 January 2007
Fort Lewis, Washington 98433-9500	)	

It is hereby stipulated by and between the prosecution and the defense, with the express consent of the accused, that the following facts are true, that these facts are admissible without regard to any evidentiary rule or Rule for Courts-Martial that might otherwise make them inadmissible, that these facts and enclosures, hereby incorporated by reference, may be considered by the military panel during the merits and pre-sentencing phase of 1LT Ehren Watada's court-martial, and may also be considered by the military judge, military panel, appellate courts, or convening authority for any purpose, to include the sentencing authority in determining an appropriate sentence. These stipulated facts shall be admissible even if they would otherwise be inadmissible; the accused specifically waives any objection he may have regarding the admission into evidence of these facts. With this stipulation, however, the defense does not waive any future claim with regard to the motions and objections previously litigated.

STIPULATED FACTS

CHARGES AND SPECIFICATIONS

1. In February 2006, 1LT Ehren Watada trained with his unit at the National Training Center with knowledge of the unit's upcoming deployment to Iraq. On numerous occasions throughout March to June 2006, 1LT Watada was notified of his requirement to deploy with his unit to Iraq in June 2006. On several occasions in June 2006, 1LT Watada was notified of his specific requirement to deploy on the morning of 22 June 2006 and was given detailed manifest information.

2. On 7 June 2006, 1LT Watada made a public statement in Tacoma, Washington, via videotape regarding his decision to not deploy to Iraq. The attached video (See Enclosure 1) is an authentic and completely fair and accurate representation of the public statement. In that speech on 7 June 2006, 1LT Watada said the following:

> *Family, friends, members of the religious community, members of the press, and my fellow Americans: Thank you for coming today.*
>
> *My name is Ehren Watada. I am a First Lieutenant in the U.S. Army and I have served for three years.*

PROSECUTION EXHIBIT 4 ~~FOR ID~~ 8 Feb 07

APPELLATE EXHIBIT XXIV (24)

It is my duty as a commissioned officer of the United States Army to speak out against grave injustices. My moral and legal obligation is to the Constitution and not to those who would issue unlawful orders. I stand before you today because it is my job to serve and protect America's Soldiers, its people, and innocent Iraqis who have no voice.

It is my conclusion as an officer of the Armed Forces that the war in Iraq is not only morally wrong, but a horrible breach of American law. Although I have tried to resign out of protest, I will be forced to participate in a war that is manifestly illegal. As the order to take part in an illegal act is ultimately unlawful as well, I must as an officer of honor and integrity refuse that order.

The war in Iraq violates our democratic system of checks and balances. It usurps international treaties and conventions that by virtue of the Constitution become American law. The wholesale slaughter and mistreatment of Iraqis is not only a terrible moral injustice, but it is a contradiction to the Army's own Law of Land Warfare. My participation would make me party to war crimes.

Normally, those in the military have allowed others to speak for them and act on their behalf. I believe that time has come to end. I have appealed to my commanders to see the larger issues of their actions. But justice has not been forthcoming. My oath of office is to serve and protect America's laws and its people. By refusing an unlawful order for an illegal war, I fulfill that oath today.

Thank you.

3. In an interview with news reporter Sarah Olson on ~~7 June~~ 2 MAY 2006, in ~~Tacoma, Washington,~~ SAN FRANCISCO, CALIFORNIA, 1LT Watada made a public statement regarding his decision to not deploy to Iraq. Sarah Olson published the interview on 7 June 2006 with 1LT Watada's knowledge. In that interview, 1LT Watada said the following:

Sarah Olson: *When you joined the Army in 2003, what were your goals?*

1LT Watada: *2003 was a couple of years after the terrorist attacks of 9/11. I had the idea that my country needed me and that I needed to serve my country. I still strongly believe that. I strongly believe in service and duty. That's one of the reasons I joined: because of patriotism.*

I took an oath to the US Constitution, and to the values and the principles it represents. It makes us strongly unique. We don't allow tyranny; we believe in accountability and checks and balances, and a government that's by and for the people. The military must safeguard those freedoms and those principles and the democracy that makes us unique. A lot of people, like myself, join the military because they love their country, and they love what it stands for.

Sarah Olson: *You joined the Army during the run-up to the Iraq war, but you had misgivings about the war. How did that happen?*

1LT Watada: *Like everybody in America and around the world, I heard what they were saying on television about the stockpiles of weapons of mass destruction, and the ties to al-Qaeda and 9/11. I also saw the millions of people around the world protesting, and listened to the people resigning from the government in protest. I realized that the war probably wasn't justified until we found proof of these accusations the president and his deputies were making against Iraq.*

But I also believed we should give the president the benefit of the doubt. At that time, I never believed ... I could never conceive of our leader betraying the trust we had in him.

Sarah Olson: *What was your experience in the military?*

1LT Watada: *My first duty assignment was in Korea. It's hard learning to be an officer, and it was hard being stationed overseas. It is a different kind of situation that you're put in. You're not just being told what to do and execute. As an officer, you are constantly leading by example. You have to do the right thing even when you don't necessarily want to. When you go into the field, it's not like a civilian job where you go home at the end of the day, take a shower, relax, and eat a nice meal.*

Sarah Olson: *So you got the order to go to Iraq after you returned from Korea. What were your thoughts at the time?*

1LT Watada: *Back in Korea we trained for a separate mission, but we all knew what was going on in Iraq. Our commanders were telling us to be ready for war and to start training for it.*

When I came back I still had doubts about the war and why we were in it. When they told me I was going to deploy, I said OK: I'm going to start training for it, and I'm going to start training the guys under me. And I'm going to do that to the best of my ability.

Sarah Olson: *So what changed?*

1LT Watada: *I realized that to go to war, I needed to educate myself in every way possible. Why were we going to this particular war? What were the effects of war? What were the consequences for soldiers coming home? I began reading everything I could.*

One of many books I read was James Bamford's Pretext for War. As I read about the level of deception the Bush administration used to initiate and process this war, I was shocked. I became ashamed of wearing the uniform. How can we wear something with such a time-honored tradition, knowing we waged war based on a misrepresentation and lies? It was a betrayal of the trust of the American people. And these lies were a betrayal of the trust of the military and the soldiers.

My mind was in turmoil. Do I follow orders and participate in something that I believed to be wrong? When you join the Army you learn to follow orders without question. Soldiers are apolitical, and you don't voice your opinion out loud.

I started asking, why are we dying? Why are we losing limbs? For what? I listened to the president and his deputies say we were fighting for democracy; we were fighting for a better Iraq. I just started to think about those things. Are those things the real reasons why we are there, the real reasons we were dying? But I felt there was nothing to be done, and this administration was just continually violating the law to serve their purpose, and there was nothing to stop them.

The deciding moment for me was in January of 2006. I had watched clips of military funerals. I saw the photos of these families. The children. The mothers and the fathers as they sat by the grave, or as they came out of the funerals. One really hard picture for me was a little boy leaving his father's funeral. He couldn't face the camera so he is covering his eyes. I felt like I couldn't watch that anymore. I couldn't be silent any more and condone something that I felt was deeply wrong.

Sarah Olson: *You made decision to refuse orders to deploy to Iraq. What happened next?*

1LT Watada: *I alerted my commander this January, and told him I would refuse the order to go to Iraq. He asked me to think it over. After about a week, I said OK; I've made my decision. I've come to believe this is an illegal and an immoral war, and the order to have us deploy to Iraq is unlawful. I won't follow this order and I won't participate in something I believe is wrong.*

My commanders told me that I could go to Iraq in a different capacity. I wouldn't have to fire a weapon and I wouldn't be in harm's way. But that's not what this is about. Even in my resignation letter I said that I would rather go to prison than do something that I felt was deeply wrong. I believe the whole war is illegal. I'm not just against bearing arms or fighting people. I am against an unjustified war.

Sarah Olson: *You've had about six months to think about this. It's a pretty heavy revelation that you're quite possibly facing prison time. How are you feeling now?*

1LT Watada: *A lot of people including my parents tried to talk me out of it. And I had to tell them, and I had to convince myself first, that it's not about just trying to survive. It's not about just trying to make sure you're safe. When you are looking your children in the eye in the future, or when you are at the end of your life, you want to look back on your life and know that at a very important moment, when I had the opportunity to make the right decisions, I did so, even knowing there were negative consequences.*

Sarah Olson: *What is your intellectual and moral opposition to the Iraq war? What is that based on?*

1LT Watada: *First, the war was based on false pretenses. If the president tells us we are there to destroy Saddam's weapons of mass destruction, and there are none, why are we there? Then the president said Saddam had ties to al-Qaeda and 9/11. That allegation has been proven to be false too. So why are we going there? The president says we're there to promote democracy, and to liberate the Iraqi people. That isn't happening either.*

Second, the Iraq war is not legal according to domestic and international law. It violates the Constitution and the War Powers Act, which limits the president in his role as commander in chief from using the armed forces in any way he sees fit. The UN Charter, the Geneva Convention, and the Nuremberg principles all bar wars of aggression.

Finally, the occupation itself is illegal. If you look at the Army Field Manual, 27-10, which governs the laws of land warfare, it states certain responsibilities for the occupying power. As the occupying power, we have failed to follow a lot of those regulations. There is no justification for why we are there or what we are doing.

Sarah Olson: *One of the common criticisms of military resisters is that you have abandoned your colleagues, and that you are letting others fight a war in your place. What's you're response to this?*

1LT Watada: *My commander asked me, if everybody like you refused to go to Iraq, what would that leave us with? And I guess he was trying to say we wouldn't have an army anymore, and that would be bad. But I wanted to tell him if that happened the war would stop, because nobody would be there to fight it.*

When people say, you're not being a team player or you are letting your buddies down, I want to say that I am fighting for my men still, and I am supporting them. But the conscionable way to support them is not to drop artillery and cause more destruction. It is to oppose this war and help end it so all soldiers can come home. It is my duty not to follow unlawful orders and not participate in things I find morally reprehensible.

Sarah Olson: *Are your feelings common among people in the military?*

1LT Watada: *The general sentiment of people within the military is that they're getting a little sick and tired of this war. You can tell with the recent Zogby poll that said more than 70% of people in the military want to withdraw the end of this year. That's a powerful statement from people within the military who aren't really given the chance to speak out publicly.*

Sarah Olson: *What do you think the US should do in Iraq now?*

1LT Watada: *I think the US should pull out all troops immediately. The outbreak of the civil war is something that we caused with our invasion and our war. I don't think it's at a point right now where we can fix it.*

Sarah Olson: *You've mentioned your sense of betrayal. Can you explain this?*

1LT Watada: *The president is the commander in chief, and although he is our leader, there must be a strong relationship of trust. Anybody who's been in the military knows that in order to have a cohesive and effective fighting force, you need to have a certain level of trust between leaders and soldiers. And when you don't, things start to break down.*

I signed a contract saying I will follow orders, and do what I'm told to do. There are times when I won't be able to question it and evaluate the legality of these orders, so I have to have the ultimate trust in my leader. I have to trust the president's word, and trust him to do what's right. I have to trust him to sacrifice our lives only for justified and moral reasons. Realizing the president is taking us into a war that he misled us about has broken that bond of trust that we had. If the president can betray my trust, it's time for me to evaluate what he's telling me to do. I've realized that going to this war is the wrong thing to do.

Sarah Olson: *What do you make of the growing anti-war sentiment in the country?*

1LT Watada: *I don't see it manifest. Soldiers who come back from Iraq say they get the impression many people don't know a war is going on; they say even friends and family seem more involved in popular culture and American Idol. People are not interested in the hundreds of Iraqis and the dozens of Americans dying each week.*

Sarah Olson: *How does the plight that faces Iraqi civilians impact your decision not to go?*

1LT Watada: *Saddam Hussein was a brutal dictator. He was repressive. He did use torture. But the torture and the killing hasn't stopped since we've been there. It's something I don't think I or anybody else in this country should be a part of.*

In war, each side dehumanizes the other. American soldiers dehumanize Iraqis, to the point where Iraqi civilians are nothing to them. And that's how these atrocities occur. You have a lot of young American men and women doing things, killing a lot of innocent civilians without thinking. The Iraqis are probably worse off than they were before we invaded the country.

Sarah Olson: *Now that you've submitted your resignation, what's next for you?*

1LT Watada: *I submitted a resignation packet, which was disapproved. My commander has asked me again if I am still going to go along with this. And I said yes of course. I still believe the same things that I did six months ago. And he said he couldn't charge me until I violate an order. So I've been given an order to deploy in late June. When I refuse, the chain of command will charge me and court-martial me.*

Sarah Olson: *As people learn about your story, are there things you especially want people to hold in their minds and their hearts about what you're doing and why?*

1LT Watada: *I think that we are all given freedoms and liberties by the Constitution but I think the one God-given freedom and right that we really have is freedom of choice. The moment we tell ourselves that we no longer have that choice is the moment we take that one freedom away. The only freedom we have. And I just want to tell everybody, especially people who doubt the war, that you do have that one freedom. And that's something that they can never take away. Yes. They will imprison you. They'll throw the book at you. They'll try to make an example out of you, but you do have that choice. And that is something that you'll have to live with for the rest of your life.*

4. At approximately 1000 hours on 22 June 2006, 1LT Watada intentionally missed the movement of his flight to Iraq. 1LT Watada was manifested for the 22 June 2006 flight (Flight Number BMYA91111173). He knew of the manifest information regarding the deployment, including the date and time of his required movement, because the unit briefed him on numerous occasions in March, April, May, and June 2006, and specifically provided him the requisite documents detailing the manifest requirements. Additionally, LTC Bruce Antonia told 1LT Watada about the flight departing McChord Air Force Base on 22 June 2006, and specifically counseled 1LT Watada regarding the manifest details of the deployment. On 19 June 2006, 1LT Watada signed a counseling statement, acknowledging the requirement for him to deploy, to include the specific details of the movement (See Enclosure 2). When 1LT Watada missed the battalion manifest call early in the morning on 22 June 2006, LTC Antonia counseled 1LT Watada once again, ordering him to draw his equipment and report to the brigade manifest call (See Enclosure 3—this document was actually signed early on the morning of 22 June 2006, not 21 June 2006). Rather than attending the brigade manifest call, 1LT Watada remained in his office. Shortly thereafter, a bus took the deploying Soldiers from Fort Lewis to McChord Air Force Base. 1LT Watada chose not to board the bus. From there, at approximately 1000 hours on 22 June 2006, the deploying Soldiers boarded an airplane and departed McChord Air Force Base en route to Mosul, Iraq, via Fight Number BMYA91111173. 1LT Watada intentionally did not board the aircraft and as a result, missed the movement of Flight Number BMYA91111173.

5. On 12 August 2006, 1LT Watada made a public statement at the Veterans for Peace national convention in Seattle, Washington. The attached video (See Enclosure 4) is an authentic and completely fair and accurate representation of the public statement. In that speech on 12 August 2006, 1LT Watada said the following:

Thank you everyone. Thank you all for your tremendous support. How honored and delighted I am to be in the same room with you tonight. I am deeply humbled by being in the company of such wonderful speakers.

You are all true American patriots. Although long since out of uniform, you continue to fight for the very same principles you once swore to uphold and defend. No one knows the devastation and suffering of war more than veterans - which is why we should always be the first to prevent it.

I wasn't entirely sure what to say tonight. I thought as a leader in general I should speak to motivate. Now I know that this isn't the military and surely there are many out there who outranked me at one point or another - and yes, I'm just a Lieutenant. And yet, I feel as though we are all citizens of this great country and what I have to say is not a matter of authority - but from one citizen to another. We have all seen this war tear apart our country over the past three years. It seems as though nothing we've done, from vigils to protests to letters to Congress, have had any effect in persuading the powers that be. Tonight I will speak to you on my ideas for a change of strategy. I am here tonight because I took a leap of faith. My action is not the first and it certainly will not be the last. Yet, on behalf of those who follow, I require your help - your sacrifice - and that of countless other Americans. I may fail. We may fail. But nothing we have tried has worked so far. It is time for change and the change starts with all of us.

I stand before you today, not as an expert - not as one who pretends to have all the answers. I am simply an American and a servant of the American people. My humble opinions today are just that. I realize that you may not agree with everything I have to say. However, I did not choose to be a leader for popularity. I did it to serve and make better the soldiers of this country. And I swore to carry out this charge honorably under the rule of law.

Today, I speak with you about a radical idea. It is one born from the very concept of the American soldier (or service member). It became instrumental in ending the Vietnam War - but it has been long since forgotten. The idea is this: that to stop an illegal and unjust war, the soldiers can choose to stop fighting it.

Now it is not an easy task for the soldier. For he or she must be aware that they are being used for ill-gain. They must hold themselves responsible for individual action. They must remember duty to the Constitution and the people supersedes the ideologies of their leadership. The soldier must be willing to face ostracism by their peers, worry over the survival of their families, and of course the loss of personal freedom. They must know that resisting an authoritarian government at home is equally important to fighting a foreign aggressor on the battlefield. Finally, those wearing the uniform must know beyond any shadow of a doubt that by refusing immoral and illegal orders they will be supported by the people not with mere words but by action.

The American soldier must rise above the socialization that tells them authority should always be obeyed without question. Rank should be respected but never blindly followed. Awareness of the history of atrocities and destruction committed in the name of America - either through direct military intervention or by proxy war - is crucial. They must realize that this is a war not out of self-defense but by choice, for profit and imperialistic domination. WMD, ties to Al Qaeda, and ties to 9/11 never existed and never will. The soldier must know that our narrowly and questionably elected officials intentionally manipulated the evidence presented to Congress, the public, and the world to make the case for war. They must know that neither Congress nor this administration has the authority to violate the prohibition against pre-emptive war - an American law that still stands today.

This same administration uses us for rampant violations of time-tested laws banning torture and degradation of prisoners of war. Though the American soldier wants to do right, the illegitimacy of the occupation itself, the policies of this administration, and rules of engagement of desperate field commanders will ultimately force them to be party to war crimes. They must know some of these facts, if not all, in order to act.

Mark Twain once remarked, "Each man must for himself alone decide what is right and what is wrong, which course is patriotic and which isn't. You cannot shirk this and be a man. To decide against your conviction is to be an unqualified and inexcusable traitor, both to yourself and to your country ..." By this, each and every American soldier, marine, airman, and sailor is responsible for their choices and their actions. The freedom to choose is only one that we can deny ourselves.

The oath we take swears allegiance not to one man but to a document of principles and laws designed to protect the people. Enlisting in the military does not relinquish one's right to seek the truth - neither does it excuse one from rational thought nor the ability to distinguish between right and wrong. "I was only following orders" is never an excuse.

The Nuremburg Trials showed America and the world that citizenry as well as soldiers have the unrelinquishable obligation to refuse complicity in war crimes perpetrated by their government. Widespread torture and inhumane treatment of detainees is a war crime. A war of aggression born through an unofficial policy of prevention is a crime against the peace. An occupation violating the very essence of international humanitarian law and sovereignty is a crime against humanity. These crimes are funded by our tax dollars. Should citizens choose to remain silent through self-imposed ignorance or choice, it makes them as culpable as the soldier in these crimes.

The Constitution is no mere document - neither is it old, out-dated, or irrelevant. It is the embodiment of all that Americans hold dear: truth, justice, and equality for all. It is the formula for a government of the people and by the people. It is a government that is transparent and accountable to whom they serve. It dictates a system of checks and balances and separation of powers to prevent the evil that is tyranny.

As strong as the Constitution is, it is not foolproof. It does not fully take into account the frailty of human nature. Profit, greed, and hunger for power can corrupt individuals as much as they can corrupt institutions. The founders of the Constitution could not have imagined how money would infect our political system. Neither could they believe a standing army would be used for profit and manifest destiny. Like any common dictatorship, soldiers would be ordered to commit acts of such heinous nature as to be deemed most ungentlemanly and unbecoming that of a free country.

The American soldier is not a mercenary. He or she does not simply fight wars for payment. Indeed, the state of the American soldier is worse than that of a mercenary. For a soldier-for-hire can walk away if they are disgusted by their employer's actions. Instead, especially when it comes to war, American soldiers become indentured servants whether they volunteer out of patriotism or are drafted through economic desperation. Does it matter what the soldier believes is morally right? If this is a war of necessity, why force men and women to fight? When it comes to a war of ideology, the lines between right and wrong are blurred. How tragic it is when the term Catch-22 defines the modern American military.

Aside from the reality of indentured servitude, the American soldier in theory is much nobler. Soldier or officer, when we swear our oath it is first and foremost to the Constitution and its protectorate, the people. If soldiers realized this war is contrary to what the Constitution extols - if they stood up and threw their weapons down - no President could ever initiate a war of choice again. When we say, "...: Against all enemies foreign and domestic," what if elected leaders became the enemy? Whose orders do we follow? The answer is the conscience that lies in each soldier, each American, and each human being. Our duty to the Constitution is an obligation, not a choice.

The military, and especially the Army, is an institution of fraternity and close-knit camaraderie. Peer pressure exists to ensure cohesiveness but it stamps out individualism and individual thought. The idea of brotherhood is difficult to pull away from if the alternative is loneliness and isolation. If we want soldiers to choose the right but difficult path - they must know beyond any shadow of a doubt that they will be supported by Americans. To support the troops who resist, you must make your voices heard. If they see thousands supporting me, they will know. I have heard your support, as has Suzanne Swift, and Ricky Clousing - but many others have not. Increasingly, more soldiers are questioning what they are being asked to do. Yet, the majority lack awareness to the truth that is buried beneath the headlines. Many more see no alternative but to obey. We must show open-minded soldiers a choice and we must give them courage to act.

Three weeks ago, Sgt. Hernandez from the 172nd Stryker Brigade was killed, leaving behind a wife and two children. In an interview, his wife said he sacrificed his life so that his family could survive. I'm sure Sgt. Hernandez cherished the camaraderie of his brothers, but given a choice, I doubt he would put himself in a position to leave his family husbandless and fatherless. Yet that's the point, you see. People like Sgt. Hernandez don't have a choice. The choices are to fight in Iraq or let your family starve. Many soldiers don't refuse this war en mass because, like all of us, they value their families over their own lives and perhaps their conscience. Who would willingly spend years in prison for principle and morality while denying their family sustenance?

I tell this to you because you must know that to stop this war, for the soldiers to stop fighting it, they must have the unconditional support of the people. I have seen this support with my own eyes. For me it was a leap of faith. For other *soldiers, they do not have that luxury. They must know it and you must show it to them. Convince them that no matter how long they sit in prison, no matter how long this country takes to right itself, their families will have a roof over their heads, food in their stomachs, opportunities and education. This is a daunting task. It requires the sacrifice of all of us. Why must Canadians feed and house our fellow Americans who have chosen to do the right thing? We should be the ones taking care of our own. Are we that powerless - are we that unwilling to risk something for those who can truly end this war? How do you support the troops but not the war? By supporting those who can truly stop it; let them know that resistance to participate in an illegal war is not futile and not without a future.*

I have broken no law but the code of silence and unquestioning loyalty. If I am guilty of any crime, it is that I learned too much and cared too deeply for the meaningless loss of my fellow soldiers and my fellow human beings. If I am to be punished it should be for following the rule of law over the immoral orders of one man. If I am to be punished it should be for not acting sooner. Martin Luther King Jr. once said, "History will have to record that the greatest tragedy of this period ... was not the strident clamor of the bad people, but the appalling silence of the good people."

Now, I'm not a hero. I am a leader of men who said enough is enough. Those who called for war prior to the invasion compared diplomacy with Saddam to the compromises made with Hitler. I say, we compromise now by allowing a government that uses war as the first option instead of the last to act with impunity. Many have said this about the World Trade Towers, "Never Again." I agree. Never again will we allow those who threaten our way of life to reign free - be they terrorists or elected officials. The time to fight back is now - the time to stand up and be counted is today.

I'll end with one more Martin Luther King Jr. quote:

One who breaks an unjust law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law.

Thank you and bless you all.

6. All of 1LT Watada's statements identified in this Stipulation of Fact are authentic. All parties stipulate to the veracity and reliability of the statements and interviews, both video and

written, and therefore agree to their authentication and admissibility into evidence during both the findings and pre-sentencing phases of the court-martial.

EHREN K. WATADA
1LT, FA
ACCUSED

ERIC SEITZ
DEFENSE COUNSEL

DANIEL R. KUECKER
CPT, JA
TRIAL COUNSEL

/s/ Mark Kim

MARK KIM
CPT, JA
DEFENSE ATTORNEY

DEPARTMENT OF THE AR
5TH BATTALION, 20TH INFANTRY REGIMENT
SYKES' REGULARS
3RD BRIGADE, 2ND INFANTRY DIVISION (SBCT)
Fort Lewis, Washington 98433

AFZH-INE-CDR

19 June 2006

MEMORANDUM FOR RECORD

SUBJECT: Manifest for 1LT Watada

1. This membrandum serves as the official written order for 1LT Watada to draw equipment, attend battalion manifest call, move to and attend brigade manifest call, move to APOE, and board the aircraft for deployment to OIF.

2. You are hereby ordered to comply with the following timeline on 22 June, 2006.

   a. NLT 0300: Draw sensitive items from HHC.
   b. 0400: Attend battalion manifest call as directed by HHC 1SG (chalk leader).
   c. IAW HHC 1SG orders: Move to Sheridan Gym with ADVON chalk.
   d. 0505: attend Brigade manifest call.
   e. IAW HHC 1SG orders: Board bus, move to McChord THA, board aircraft for movement to OIF.

3. The point of contact for this memorandum is the undersigned at 967-2376 or bruce.antonia@us.army.mil.

EHREN WATADA
1LT, FA
Targeting Officer

BRUCE ANTONIA
LTC, IN
Commanding

Enclosure 2

DEPARTMENT OF THE ARI
5TH BATTALION, 20TH INFANTRY REGIMENT
SYKES' REGULARS
3RD BRIGADE, 2ND INFANTRY DIVISION (SBCT)
Fort Lewis, Washington 98433

AFZH-INE-CDR 21 June 2006

MEMORANDUM FOR RECORD

SUBJECT: Second order to deploy

1. You have missed battalion manifest call. You are hereby ordered to draw your equipment and report to brigade manifest call.

2. If you choose not to mov o brigade manifest call (or to McChord AFB for deployment), you will remain at your place of duty – FSE office - until I return from seeing the ADVON chalk off. As your chalk is now in a communications "blackout", you will also not make any unofficial communications (meaning – no email or phonecon unless it is directly related to your job or legal).

3. Nothing in this order prevents you from speaking with civilian attorneys or Trial Defense Services at JAG.

4. The point of contact for this memorandum is the undersigned at 967-2376 or bruce.antonia@us.army.mil.

EHREN WATADA
1LT, FA
Targeting Officer

BRUCE ANTONIA
LTC, IN
Commanding

Enclosure 3

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
MAHER, SULLIVAN, and HOLDEN
Appellate Military Judges

First Lieutenant EHREN K. WATADA, Petitioner
v.
The United States of America,
and
Lieutenant Colonel JOHN M. HEAD,
and
Lieutenant General JAMES DUBIK,
and
Brigadier General WILLIAM TROY,
Respondents

ARMY MISC 20070535

ORDER

On consideration of Petitioner's Petition for Extraordinary Relief in the Nature of a Writ of Prohibition and Application for a Stay of Proceedings, filed in the above case on 17 May 2007, it is by the Court this date,

ORDERED:

That Petitioner's request for an immediate stay of proceedings is granted in part. The government may proceed in its case against Petitioner up to, but not including, assembly of the court-martial. Assembly of the court-martial and all proceedings ordinarily following assembly of the court-martial are hereby stayed;

That Respondents shall show cause why such Writs of Prohibition should not be granted by filing an answer to the Petition in accordance with Rule 20(e) of this Court's Rules of Practice and Procedure within ten (10) days of receipt of this Order; and

That Petitioner may file a reply to the Government's answer within seven (7) days of receipt of the Respondent's answer to this Order.

DATE: 18 May 2007

FOR THE COURT:

MALCOLM H. SQUIRES, JR.
Clerk of Court

WATADA – ARMY MISC 20070535

CF: JALS-CR2
JALS-GA
Petitioner
Respondents

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
MAHER, SULLIVAN, and HOLDEN
Appellate Military Judges

First Lieutenant EHREN K. WATADA, Petitioner
v.
The United States of America,
and
Lieutenant Colonel JOHN M. HEAD,
and
Lieutenant General JAMES DUBIK,
and
Brigadier General WILLIAM TROY,
Respondents

ARMY MISC 20070535

ORDER

Petitioner has filed a motion for extraordinary relief to enjoin his upcoming court-martial on former jeopardy grounds without first moving to dismiss under R.C.M. 907(b)(2)(C) and 915(c)(2). Under these circumstances, we deny petitioner's motion for extraordinary relief. Our order of 18 May 2007 is vacated.

DATE: 29 June 2007

FOR THE COURT:

MALCOLM H. SQUIRES, JR.
Clerk of Court

CF: JALS-CR2
JALS-GA
Petitioner
Respondents

IN THE UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

First Lieutenant Ehren K. Watada,
United States Army,

Petitioner,

v.

LTC John M. Head, Military Judge, Lt. Gen. James Dubik, Commander, I Corps, Fort Lewis, Washington (Convening Authority for General Court-Martial), Brig. Gen. William Troy (Acting GCMCA), the United States Army, and the United States,

Respondents.

PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF PROHIBITION **AND APPLICATION FOR STAY OF PROCEEDINGS**

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
ARMY COURT OF CRIMINAL APPEALS

James E. Lobsenz
Kenneth S. Kagan
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I. PREAMBLE

COME NOW the undersigned defense counsel on behalf of the Petitioner, and, pursuant to Rules 2(b) and 20 of this Court's Rules of Practice and Procedure, petition this Honorable Court to grant a Writ of Prohibition to order the military judge to dismiss with prejudice all charges pending against Petitioner, as a second trial would violate Petitioner's right to be free from a second trial for the same offenses.

This Petition is supported by the accompanying "Brief in Support of Petition for Extraordinary Relief in the Nature of a Writ of Prohibition."

A. REQUEST FOR A STAY OF PROCEEDINGS

Because jeopardy previously attached, and a mistrial was improvidently granted in an abuse of discretion, a second trial on the same charges is the very evil sought to be avoided. In light of the substantial likelihood that Petition will prevail on the merits of his motion for dismissal, it is appropriate for this Court to grant Petitioner's Application for a Stay of Proceedings until this matter has been decided with finality by the appellate courts.

B. THIS COURT SHOULD EXERCISE EXTRAORDINARY WRIT JURISDICTION AT THIS TIME

While it is true that Rule 20.1 of this Court's Internal Rules of Practice and Procedure indicates that issuance by this

Court of an extraordinary writ is a matter of discretion "sparingly exercised," it is likewise true that just as in the matter of *Burtt v. Schick*, 23 M.J. 140 (CMA 1986), this matter presents a unique set of circumstances that justify this Court in exercising extraordinary writ jurisdiction at this time.

One issue this Court ought to consider is the fact that Petitioner continues to be "confined," in that his term of service expired on December 4, 2006. As a result, Petitioner is compelled to remain in the service during the pendency of this matter.

Further, it would be futile to bring a motion to dismiss on double jeopardy grounds before the very same military judge (who was assigned this matter after the charges were re-referred) who made the erroneous rulings and abused his discretion in declaring the mistrial.

Finally, in this regard, just as the Court noted in *Burtt*, an additional factor this Court should consider is "the waste of time and energy that can be avoided" if the Court promptly resolves the issues before it. *Id.* at 142.

II. STATEMENT OF THE CASE

A. THE CHARGES

On November 9, 2006 the Convening Authority, Lt. General James Dubik, approved the referral of three charges to a general court-martial. The accused was charged in Count 1 with Through

Design Missing Movement Required in the Course of Duty (Article 87), alleged to have been committed on June 22, 2006; in Count 2 with one Specification of Conduct Unbecoming an Officer (Article 133), alleged to have been committed on August 12, 2006; and in Count 3 with three Specifications of Conduct Unbecoming an Officer (Article 133), alleged to have been committed on June 7, 2006. *Appellate Exhibit XV.*

B. COMMENCEMENT OF THE TRIAL

An Article 39(a) pre-trial hearing commenced on January 4, 2007, and was completed on that same date.

The court-martial reconvened for trial on February 5, 2007. The Court was apprised that the parties had entered into a Stipulation of Fact on January 26, 2007. The military judge reviewed the stipulation and stated that he felt obliged to conduct a *Bertelson*[1] inquiry on the record. ROT, *Transcript* 2/5/07, at 103. The following inquiry was conducted on the record:

> MJ: …Lieutenant Watada, I have before me prosecution Exhibit 4 for identification, a Stipulation of Fact. Do you have a copy of that in front of you?
>
> ACC: Yes, sir.
>
> MJ: It is a 12 page document with apparently a DVD - or 2 DVDs. Do you have that?
>
> ACC: Yes, sir.
>
> MJ: Turn to page 12. [The accused did as directed].

1 *United States v. Bertelson*, 3 M.J. 314 (C.M.A. 1977).

MJ: Is that your signature on the top of Page 12?

ACC: It is, sir.

MJ: Did you read this document before you signed it?

ACC: Yes. I did, sir.

MJ: Do counsel for both sides agree to the stipulation and is that your signature or your predecessor's signature that appears on the document?

TC: Yes, sir.

CC: It is also my signature, and I signed it for Captain Kim at his direction.

MJ: Lieutenant Watada, a Stipulation of Fact is an agreement among the trial counsel, your defense counsel, and you that the contents of the stipulation are true, and if entered into evidence, are the uncontradicted facts in this case. No one can be forced to enter into a stipulation, and no stipulation can be accepted without your consent, so you should enter into it only if you truly want to do so.

Do you understand that?

ACC: Yes, sir.

MJ: Are you voluntarily entering into this stipulation because you believe it is in your best interest to do so?

ACC: I am, sir.

MJ: Lieutenant Watada, the government has the burden of proving beyond a reasonable doubt every element of the offense to which you've been charged. By the stipulating to the material elements of one of the offenses, as you are doing here, you alleviate that burden; that means, based upon the stipulation alone and without receiving any other evidence the court can find you guilty of the offenses to which the stipulation relates.

Do you understand that?

ACC: I do, sir.

MJ: If I admit this stipulation into evidence it will be used in two ways.

First, members will use it to determine if you are in fact, guilty to the offenses to which the stipulation relates.

Second, the trial counsel may read the contents to the members, and they will have it with them when they decide upon your sentence.

Do you understand and agree to these uses of the stipulation?

ACC: Yes, sir.

MJ: Do both counsel agree to these uses?

TC: Yes, Your Honor.

CC: Defense agrees.

MJ: Lieutenant Watada, a Stipulation of Fact ordinarily cannot be contradicted. You should, therefore, let me know if there is anything whatsoever in the stipulation you disagree with or feel is untrue.

Do you understand that?

ACC: Yes, sir.

MJ: At this time I want you to read your copy of the stipulation silently to yourself as I read it to myself.

[The accused did as directed].

MJ: Have you finished reading it?

ACC: I have, sir.

MJ: Have you had an opportunity to review also the material contained in Enclosure 1 and Enclosure 2, the two videos?

ACC: I have seen the videos, sir.

MJ: And those are the videos of the two statements that are reflected in the Stipulation of Fact?

ACC: Yes, sir.

MJ: Lieutenant Watada, is everything in the stipulation the truth?

ACC: It is, sir.

MJ: Is there anything in the stipulation that you do not wish to admit that it's true?

ACC: No, sir.

MJ: Lieutenant Watada, have you consulted fully with your counsel about the stipulation?

ACC: Yes, sir.

MJ: After having consulted with your counsel, do you consent to my accepting the stipulation?

ACC: Yes, sir.

Id. at 126-29.

The military judge then asked a series of questions to ensure that there was a factual basis for the stipulation. *Id.* at 129-133. In the process of that questioning, it became evident that the stipulation used the wrong date and the wrong place for one of the verbal statements the accused was charged with making. *Id.* at 131-132. Changes were made to effect corrections as to the date and place of that particular statement. *Id.* at 131-132.

The judge asked the accused several more questions, including specific questions about his failure to report for deployment to Iraq. The accused stated on the record that he did not deploy because he believed the war in Iraq to be illegal:

> MJ: What was your intent regarding deployment of that aircraft?
>
> ACC: Sir, my intent, as I stated in public statements and as I stated to my chain of command numerous times, was that ***the order to deploy to Iraq to support combat operations in OIF was to me,*** as I believed in the facts and evidence that I saw, ***was an illegal order***. And that ***the war itself was illegal, and any participation of mine would be contrary to my oath,*** and therefore I would have no other choice but to refuse. So my intent was to refuse the order, sir.

Id. at 134-35 (emphasis added).

The court asked if either counsel believed that any further inquiry into the factual basis for the stipulation was necessary. *Id.* at 139. Trial counsel asked for further inquiry to establish the fact that the aircraft in question did actually leave without the accused. The court inquired further and the accused said that he had no doubt that the plane did leave and he was not on it. *Id.* Trial counsel then expressed satisfaction with the record. *Id.* at 140. The court again asked if either counsel believed that any further inquiry was necessary and both counsel replied that they did not. *Id.*

The court then took up the Pretrial Agreement, which was marked as Appellate Exhibit XXXII. *Id.* at 140. In a lengthy colloquy, the court established that the accused had signed the

Agreement; that he understood its contents; that no one forced him to enter into it; that it contained the entire agreement between the parties; and that the Exhibit was the full and complete agreement. *Id.* at 141-142.

Further, the accused acknowledged on the record that he had had a chance to look at the evidence, and to talk to his counsel about the Pretrial Agreement; that he wanted to enter into it; that he understood that in exchange for dismissal of Specifications 2 and 3 of Charge II he was agreeing to enter into a Stipulation of Fact; that he understood the stipulation could be used against him by the members to find him guilty; that if the members found him guilty they could use it to determine any sentence they might impose; and that an appellate court could also use it against him. *Id.* at 143-44.

The accused acknowledged that no forced him to enter into the Agreement, and that he wanted to enter into it. *Id.* at 145. He acknowledged that he understood what the Agreement meant, and that he knew he could decline to enter into it right at that very moment and simply elect to go to trial on all the charges. *Id.* at 146, 147. Lt. Watada stated on the record that he was freely entering into the Agreement because he wanted to, and that he had no doubt about doing that. *Id.* at 147-148.

Finally, the judge also discussed with the accused the fact that the Agreement could be cancelled if he brought up something "inconsistent" with the facts he had stipulated to:

> MJ: And the last way this can be cancelled is if I refuse to accept the Stipulation of Fact. How that can happen is ***if you bring up something or your counsel bring up something inconsistent with what you've stipulated to as the uncontradicted facts*** in this case. Do you understand that?
>
> ACC: Yes, sir.
>
> MJ: ***That if the stipulation says, "Red," and you come in and say, "Blue," I'll have to reopen*** what we talked about earlier, ***and kind of make sure*** those - that we're still on the same sheet of music here about whether ***this is an accurate stipulation of fact.*** Do you understand that?
>
> ACC: I understand, sir.

Id. at 148 (emphasis added).

The accused then confirmed he had had enough time to confer with his counsel, he was satisfied with his counsel's advice; he was entering the Agreement of his own free will; he had no questions to ask about the Pretrial Agreement; and he understood all the terms of his Pretrial Agreement. *Id.* at 149. The Court then admitted the Stipulation of Fact (Prosecution Exhibit 4) into evidence without objection. *Id.*

Voir dire of the panel took up the remainder of the day on February 5, 2007. On February 6, 2007, Government Trial Counsel and the accused's Civilian Counsel gave their opening statements.

The Government then proceeded to call its three witnesses (two of Petitioner's commanding officers and a Professor of Officership at the William E. Simon Center for the Professional

Military Ethic, offered as an expert on military ethics and officership customs and standards).

At 15:43 on February 6, 2007, the Government rested its case. *Id.* at 353.[2]

C. **THE MILITARY JUDGE *SUA SPONTE* QUESTIONED THE WISDOM AND VALIDITY OF THE STIPULATION OF FACT**

When trial resumed the next day, February 7, 2007, the military judge announced that he had provided counsel with a draft of his proposed instructions, and that he saw as an issue involving a conflict between the Stipulation of Fact and an instruction proposed by defense counsel.

> MJ: I'm going to reopen the inquiry into the Stipulation of Fact, as a potential issue of mistake of fact has been raised by a proposed instruction by the defense, which has been marked as Appellate Exhibit XXXXV [sic].

Id. at 354. Defense counsel objected to reopening that inquiry and stated there was no justification or legal basis to do so. *Id.*

The court then inquired what the basis was for requesting the instruction, and defense counsel explained that it went to the element of intent, and was merely a reflection of the defense legal position that Lt. Watada did not act with the requisite criminal intent because his purpose in refusing to deploy was to avoid participating in what he believed to be an illegal war:

> CC: It goes to the intent element, purely to the

---

2 TC: Your Honor, at this time the government rests.
MJ: You have no more evidence to present at this time?
TC: That's correct, Your Honor.

intent element. With respect to the missing movement charge, it has always been Lieutenant Watada's position that he intended not merely to miss the movement, but to avoid participating in a war that he considered to be illegal, and that the orders to compel him to go to Iraq, in essence, were compelling him to put himself in a position where he would be supporting and engaging in war crimes.

So his specific intent, which is required by the offense, was not the mere intent to miss a movement, the intent, his state of mind, was of a different character, altogether. And, we have argued that repeatedly. We have also, as you know, in the stipulation, if you look at the last paragraph - sorry, the last sentence of the first paragraph, it says it there, and you approved this language, "With this stipulation, however, the defense does not waive any future claim with regard to the motions previously litigated."

MJ: Correct.

CC: Now, you have ruled, we believe erroneously, that the order given to him was legal. We are submitting this particular instruction again, to further highlight our argument that the order was not legal, and that the intent, which Lieutenant Watada had, was not the intent which is required for the purposes of this offense. And there is nothing in that stipulation as to his intent, only that he knew and that he missed movement and that he acted intentionally with a general intent. But there is nothing in the language of that paragraph, which was very carefully drafted between myself and prior trial counsel, with regard to anything that's raised by the instruction…

Id. at 354-55.

The judge asked the Government what its position was and Trial Counsel responded that he opposed the giving of the proposed defense instruction because he disagreed with defense counsel's position as to the type of intent required to violate

Article 87:

> TC: Your Honor, first, in regards to the intent element, I will disagree with it. The accused had the intent to miss a movement. The defense counsel would like to place the additional element in there; that he intended to not participate in what he termed, "an illegal war." That's not, in anywhere enumerated, in Article 87. The intent is the intent to miss the movement. The accused intended to miss the movement. His personal thoughts on the legality or the illegality of the war are irrelevant to the Article 87 offense.

Id. at 356.

Defense counsel acknowledged that they had a difference of legal opinion as to the type of intent required, and asserted that just because they disagreed as to a point of law, that did not mean that the defense proposed instruction conflicted in any way with their stipulation as to the facts. *Id.* at 356. When the court asked the government for its response, Trial Counsel ***agreed*** with defense counsel that there was no defense contradiction with the previously accepted Stipulation of Fact:

> CC: And we understand that [the Government's position on the type of intent required]. I'm not attempting to put words into the Government's mouth but we obviously dispute that issue. We have a difference of opinion. And that's why we can raise that issue in the stipulation. But that has been our argument and ***there is nothing in the stipulation that is contradicted by the instruction that we're offering to you.***
>
> MJ: Government?
>
> TC: ***Government tends to agree that there is no contradiction in the stipulation.*** We just absolutely disagree that this should even be an issue at this

> point. The court has previously ruled that the order was lawful, and the accused clearly intended to miss movement.

Id. at 356 (emphasis added).

The Court then stated that he was going to reopen the inquiry into whether to accept the Stipulation of Fact (which had already been accepted, and published to the members of the panel), because the accused persisted in believing that he had a legal defense, notwithstanding the Court's legal ruling that he did not:

> MJ: That's where I'm having a problem here. I feel I need to reopen the inquiry as to your client's understanding of the Stipulation of Fact and whether there is a material misunderstanding and whether he believes that there is a defense because he has stipulated to all of the elements.
>
> CC: He does believe there is a defense. We tried to raise that defense by motion and you rejected those motions. And my assumption is, consistent with your rejection of those motions, that you will reject this instruction. But we are offering it consistent with the prior motions that we raised, because his state of mind was of a different nature than what the government contends is inadequate for the purposes of this charge. And that's the only disagreement we have.
>
> There is no disagreement with any of the language contained in paragraph 4. We agreed to stipulate to that so that it would make the government's case easier in terms of not having to bring people and introduce documents, as they've done at prior proceedings to show that he didn't get on the plane; that he received the order, and that he knew what he was doing when he didn't get on the plane.
>
> MJ: I'm going to reopen the inquiry.

Id. at 356-57.

Defense counsel asked what would happen if the accused refused to answer the judge's questions and the judge said that if that happened, the Court would then reconsider admission of the stipulation. *Id.* at 358. Moreover, the judge noted that if he rejected the stipulation, then the Government would lose that evidence in support of its charges, and at that point a mistrial would be appropriate:

> CC: Are you directing him to answer the questions?
>
> MJ: ***If he does not want to answer the questions, then I will reject the stipulation*** because I cannot resolve, in my mind, that there is not an inconsistency here.
>
> CC: And then what happens?
>
> MJ: ***Then I reconsider the admission of Prosecution Exhibit 4.*** It now becomes Prosecution Exhibit 4 for identification. Under Paragraph 5 of the pretrial Agreement, "It may become null and void on the occurrence of any of the following events" and paragraph C is "The refusal of the military judge to accept the stipulation of fact."
>
> ***At that point, government has no evidence –***
>
> * * *
>
> MJ: ***…And since the government has no evidence at this point a mistrial would be in order. And I would set a new trial date***, because the government has dismissed two charges, based upon this pretrial agreement. They're entitled to their bargain, as much as your client is entitled to his bargain. ***That's what will happen.***
>
> CC: Colonel, let me just say, I would assume that if that were to happen, you would allow us sufficient time to appeal from that order ***because jeopardy has attached, and it may very well be that the retrial is***

> ***impermissible.*** If that's the case, then we would need do discuss this and make some decisions. But, I would assume that that also would follow.
>
> MJ: I would set the trial date and what actions you take with any superior court is well within what you want to [sic].

Id. at 358-59 (emphasis added).

At this juncture, defense counsel asked for a recess, and that request was granted. *Id.* at 359. When court reconvened, the accused stated that he did not object to answering the judge's questions. *Id.* The Court proceeded to remind Lt. Watada that he had previously told him that he could revoke the Stipulation of Fact if he stipulated to one fact and then later contradicted that factual admission:

> MJ: Please turn to page 7. Do you recall our conversation at the beginning of the trial when I talked to you about if I thought there might be a matter that might be inconsistent with what we've discussed, and that I may have to clarify that matter in the stipulation of fact? Do you remember that conversation?
>
> ACC: Sir, inconsistent with what I stipulated to in the facts?
>
> MJ: Yes.
>
> ACC: Yes, sir.

Id. at 361 (emphasis added).

The judge asked the accused again what it meant to him when he stipulated that he intentionally missed the movement of his unit, and Lt. Watada again responded that it meant that he deliberately refused to deploy because he felt he could not participate in an illegal war:

> MJ: We discussed that during the pretrial discussion of the pretrial agreement portions. Do you remember that?
>
> ACC: I remember, sir.
>
> MJ: Taking a look at Paragraph 4 of the Stipulation of Fact on Page 7. What does it mean that you intentionally did not aboard [sic] the aircraft?
>
> ACC: Your Honor, in that sentence, paragraph 4, what I was saying is that I intentionally missed the movement because ***I believed my participation in the war in Iraq would contribute to war crimes, and it would be contributing to what I believed an illegal war.***
>
> MJ: So when you talk about you intentionally missed this movement, ***did you believe you had a duty*** to make that movement?"
>
> ACC: Your Honor, ***no. I did not feel I had that duty, because I was being ordered to do something I felt was illegal***.
>
> MJ: I'm not trying to trick you or trap you in any way. I just want to know what you think.
>
> ACC: I understand.
>
> MJ: What you think this paragraph means.
>
> ACC: Yes, sir.
>
> MJ: Do you believe you have a defense to missing movement?
>
> ACC: Your Honor, ***I have always believed***, especially at this point in time, ***that I had a legal and moral defense. I realize*** that the government has made arguments contrary to that, and ***that you've also made rulings contrary to that***. ***It still does not negate my belief*** that I still have a defense.

MJ: Understand. I'm not trying to force you to make any decision that force [sic] you to enter into this stipulation. You should only enter into this stipulation if you truly want to do so. Do you understand that?

ACC: I do sir.

MJ: Do you believe that paragraph 4 admits every element of the offense of missing movement?

ACC: Sir, no, it does not. Because I had a specific reason for what I intended to do and that was as I stated earlier.

MJ: That's where I'm having a problem reconciling that you intentionally did not aboard [sic] the aircraft, because if you had no duty to board the aircraft, why would you intentionally not board the aircraft. If you believed you did not have a duty to do so, regardless of whether it's a legal duty or not, what did you believe?

ACC: Your Honor, I did not board the aircraft out of negligence or because I thought it was a mistake. It's because I felt that what I was being asked to do - by intentionally missing the movement, I could not take part in it.

MJ: I'm going to read you what we covered back in the first session on Monday and I want you to explain to me what you think this meant to you, when I read, "Lieutenant Watada, the government has the burden of proving beyond a reasonable doubt every element of the offenses with which you are charged. By stipulating to the material elements of the offense of missing movement, as you are doing here, you alleviate that burden. That means based upon the stipulation alone and without receiving any other evidence this court can find you guilty of the offense to which this stipulation relates. Do you understand that?" And you told me that you did. What does that mean to you because you stipulated to every element of the offense of missing movement by design?

ACC: Sir, yes, I do understand that I stipulated, and I believe - I understand the arguments that the

> prosecution was making. But I also understand that there is additional evidence that could go to my defense.

Id. at 362-64 (emphasis added).

The Court inquired of defense counsel whether he believed that the Stipulation of Fact was a confessional stipulation, and defense counsel replied he did not:

> MJ: Defense, do you believe that this stipulation is a 'confessional stipulation' as contemplated by Rule for Court Martial 811?
>
> CC: As far as it goes, it is a stipulation of fact, which was intended to relieve the government of proving certain facts; however, ***it has always been our position that Lieutenant Watada has a defense*** based upon the motions that we raised earlier, which you precluded us from raising at trial, and we are not altering our position in that respect, nor did we alter it in this stipulation, ***as I pointed out to you in the preparatory paragraph in the last sentence which says that this stipulation is being made subject to prior arguments and without waiving those arguments.***
>
> MJ: That's a completely different matter, then. Do [sic] believe that this is the [sic] confessional stipulation, as contemplated by Rule for Court Martial 811?
>
> CC: I believe that you and the government could interpret it as that and that the government could argue, based upon this stipulation, that they don't have to prove anything further based upon their theory of the case. ***Our theory of the case is somewhat different.***
>
> MJ: Thank you. Government, did the Convening Authority believe that this was a confessional stipulation of fact? Was that presented to him in that manner?
>
> TC: Your Honor, honestly, right now, I'm - of course,

> I'm a representative of the Staff Judge Advocate. I did not present this to the Convening Authority, nor was I present when this issue was presented.
>
> MJ: What I'm asking is did the government enter into this stipulation and into this pretrial agreement, believing you had a confessional stipulation of fact; believing that there was any - as to Charge 1, that there was any material fact not admitted?
>
> TC: Your Honor, we believe that Paragraph 4 provides evidence of every material fact in Article 87. In other words, we have evidence to prove every element in Article 87. ***We understand the defense's position that they believe they have a defense. Obviously we disagree.*** But, we believe that we have met our burden by -

Id. at 364-65 (emphasis added).

Shifting his focus from the Stipulation of Fact to the Pretrial Agreement, the Court expressed its concern, but neither counsel agreed with the Court, that there was a failure to have a "meeting of the minds":

> MJ: ...[W]where I am having problems is - are we - ***I'm not seeing that we have a meeting of the minds, here.*** And like any contract, if there is not a meeting of minds, there is not a contract. Tell me where I'm missing something, government? I'll let you answer in just a minute, defense.
>
> TC: In terms of the four corners of this agreement, ***I think there is a meeting of the minds. I think both parties agreed*** to the contents of Paragraph 4 of the Stipulation of Fact. That goes to the "what" of the offense.
>
> The defense would want to raise the issue of "why" as a defense, and we would object to that. But in terms of what's contained in agreement, ***I think - obviously, let the defense chime in, but believe there was a meeting of the minds.***

Id. at 365-66 (emphasis added).

The Court asked the Government if the accused had not "set up matters" inconsistent with the Stipulation of Fact, but the Government responded that it did not think so:

> MJ: Counsel, under *Bertelson*, don't you have to do, essentially, a care [sic] inquiry[3] with the accused?
>
> TC: That's correct. And that's also set forth in *Enlow* but -
>
> MJ: Did he not - ***has he not set up matters inconsistent with*** - he believes he has a defense to what he has stipulated to in a confessional stipulation. Whether it is a valid defense or not, government, isn't the point.
>
> TC: ***Your Honor, I don't see it.*** I mean, the subjective beliefs of the accused and that he has a defense are irrelevant.
>
> MJ: Counsel, it's just like if he pled not guilty, but as to this offense, you have to treat it essentially like a guilty plea, because he admits to all the facts surrounding the offense. That's what *Bertelson* is about. That's what all that case law is about. It's so you don't shortcut the system.
>
> TC: ***Your Honor, I don't see how this is short cutting the system.*** In another case, the accused can plead to the elements of the crime and then still get up and say, "But I have a reason." He has pled not guilty to the offense.

Id. at 366-67 (emphasis added).

The Court asked if defense counsel wanted to be heard, and defense counsel attempted to explain to the Court that there was no inconsistency between a Stipulation of **Fact** and a legal theory

[3] What was likely intended here was a reference to the type of inquiry

or a legal conclusion, which the Court disagreed with.

> CC: …***This is a stipulation; it's not a guilty plea.*** It's a stipulation of facts. That is to be judged differently. ***The impact or the effect of the stipulation, the parties can disagree about.*** And we apparently do disagree, but Lieutenant Watada's pleading not guilty. He's always made that clear. And yet, he is willing to plead to the facts which he understood could be sufficient on which to find him guilty, as you instructed. He knows that based upon the legal rulings and determinations the court makes. But he still maintains, notwithstanding those rulings, that he is entitled to plead not guilty for the reasons that he has stated to you.
>
> MJ: What does "uncontradicted" mean? What uncontradicted material facts? He's essentially pled guilty to missing movement by design by admitting to every fact necessary.
>
> CC: ***That's a legal conclusion,*** which you're drawing, and which you may be entitled to draw, subject to whatever legal rulings you make. ***It's not a legal ruling which we agree with and it's not a conclusion that we will draw no matter how much you argue to us about it we will not draw that conclusion,*** and we will also appeal it, if necessary.
>
> MJ: I'm just trying to understand how his subjective belief fits into this because he's raising that he doesn't believe he intentionally missed the movement.
>
> CC: What he's said to you in his answers to your questions is that the act of not getting on the plane was not a mistake. He did that deliberately. But ***he did it for a specific reason out of a specific intent with which the government does not agree and which the Government deems to be irrelevant and which you have ruled is irrelevant***. That's all he is saying. And he's made that argument from the beginning, long before he actually failed to get on the plane. That's simply our position.

Id. at 367-68 (emphasis added).

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required by *United States v. Care*, 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969).

The judge asked Trial Counsel if he understood the Court's problem and Trial Counsel candidly said he did not:

> MJ: Do you understand my problem, government, with this?
>
> TC: Frankly, Your Honor, no.

Id. at 368.

D. THE MILITARY JUDGE'S ACTIONS APPEARED TO BE AN ATTEMPT TO COMPEL GOVERNMENT COUNSEL TO SEEK A MISTRIAL, DESPITE ITS OBVIOUS MISGIVINGS

After vainly trying one more time to get counsel for the Government to agree with him, the Court again stated that it was contemplating declaring a mistrial:

> MJ: At this point I'm thinking we're going to have to reset a new trial date and those other charges will come back. Why don't we take 15 minutes…And when we come back, I'll make my ruling.

Id. at 369.

When court reconvened, the judge asked defense counsel and Government counsel one more time if they could not see that the Stipulation of Fact was a confessional stipulation, but both again did not agree with the court:

> MJ: Mr. Seitz, defense counsel, one more time: Do you believe that Prosecution Exhibit 4 is a confessional stipulation, as to Charge 1?
>
> CC: ***No, I do not. I believe it's a stipulation of fact.***
>
> MJ: Government, I understand you needed some more time. Have you had enough time? Did you have the time that you needed?

> TC: We did, Your Honor. Thank you. ***The government concurs, and believes this also to be a stipulation of fact.***
>
> MJ: Does it not cover every element of the offense? Is this not a confessional stipulation of fact? How can I accept a confessional stipulation of fact under *Bertelson* where the defense doesn't concur that it's a confessional stipulation of fact?
>
> TC: The government's understanding is that it is a stipulation of fact; the accused has not pleaded guilty to the offense and ***if he [has] evidence to present that would be able to prove that he is not guilty of the offense, then the court should hear that evidence.***

Id. at 370-71 (emphasis added).

When counsel for the government reiterated that he agreed with defense counsel, the Court simply announced that it was rejecting the Stipulation of Fact, and asked the Government if it wanted to move for a mistrial:

> TC: Your Honor, I don't know what else to say other than what's already been said. ***The parties agree about the contents of the stipulation - the parties agree that it is a stipulation of fact.***
>
> MJ: That's not the issue. ***At this point I'm reconsidering Prosecution Exhibit 4 and rejecting the stipulation of fact.*** It's now Prosecution Exhibit 4 for identification, as the government has closed its case. ***Government, do you wish to reopen your case, or*** do you wish, as we now have a material breach of the pretrial agreement, ***do you wish to request a mistrial because at this point we don't have evidence on every element?***

Id. at 371 (emphasis added). At that point, Trial Counsel asked for another recess, and that request was granted. *Id.* at 372.

When Court reconvened again, the judge asked defense counsel on the record if the accused wished to withdraw from the Stipulation of Fact, and defense counsel stated he did not. At this point the Court again asked if the Government wished to move for a mistrial, and this time the Government acceded to the Court's request and made a mistrial motion:

> MJ: During a very brief 802…I stated…***I deem this to be a confessional stipulation of fact, that they would have the opportunity to withdraw from it, if they wish***. Does that accurately summarize the contents of the 802 session?
>
> TC: Yes, sir.
>
> CC: It does accurately summarize the discussion we had, and I would advise the court that ***we do not wish to withdraw from this stipulation***.
>
> MJ: Government, what is your druthers? At this point, ***I certainly entertain a motion for a mistrial and I'll set a new trial date***. At this point, I believe there is a breach of the pretrial agreement, which would allow the government to resurrect the additional charges that were dismissed because we have not reach [sic] the determination point, as required, for a dismissal with prejudice. I believe the government was, at 802, asking about the attempt [sic] element that's in there. But if you review the entirety of the stipulation of fact, that I think even a casual reading of the stipulation - every statement in there goes to the, "I do not intend to deploy." I don't know how we get around that. What we're left with is I can instruct the members, if the government wishes to go forward. I know the government does not have all of their witnesses that they would have called for the other offenses. ***So government, what's your choice***?
>
> TC: Your, Honor, ***at this point, the Government moves for mistrial***.

Id. at 373-74 (emphasis added).

The Court then asked for the defense position, and the defense stated its opposition to declaration of a mistrial.

Without considering ***any*** other alternatives, the Court then instantly declared a mistrial and proceeded to set a new trial date:

> MJ: Defense, do you want to be heard?
>
> CC: Yes. ***We would oppose the motion.***
>
> MJ: Counsel, I have the week of 19 March available.
>
> CC: Can we first determine, are you declaring a mistrial?
>
> MJ: ***I'm going to declare a mistrial.***

Id. at 374 (emphasis added).

E. THE MILITARY JUDGE'S CONFUSION ABOUT THE SIGNIFICANCE OF THE STIPULATION OF FACT, AND HIS REFUSAL TO CONTEMPLATE THE VIEWS OF COUNSEL FOR BOTH PARTIES, CAUSED HIM TO ABUSE HIS DISCRETION

The judge declared a mistrial after erroneously concluding that he had to reject the accused's Stipulation of Fact, which he had previously accepted at the start of the trial. The judge's erroneous belief that he had to reject the stipulation was predicated upon two erroneous assumptions.

First, he mistakenly concluded that the Stipulation of Fact constituted a confessional statement. Second, he mistakenly believed that the accused made some representation that was inconsistent with the ***facts*** in the stipulation. Because the judge was mistaken in these assumptions, his conclusion that he had to reject the stipulation was flawed, and the declaration of mistrial was entirely unnecessary and constituted an abuse of discretion.

The fact that defense counsel stated that the accused was going to testify, and was going to explain why he felt he had an obligation ***not*** to comply with the order to move, also demonstrates that the stipulation was not a confessional statement.

Since it was not a confessional statement, there was no need to conduct any *Bertelson* inquiry at all, and thus no need to declare a mistrial based on the erroneous perception that the accused was in some way contradicting a confessional statement of fact by proposing a jury instruction.

The military judge mistakenly believed that his duty to seek clarification was triggered by a supposed inconsistency between the Stipulation of Fact *and a proposed jury instruction* submitted by the defense. A proposed jury instruction is not testimony. A proposed jury instruction is simply one party's assertion of what the governing law is.

Because an assertion as to what the law is can never be inconsistent with an assertion of fact, ***no*** inconsistency triggering ***any*** duty to inquire can ***ever*** be triggered. Moreover, in the instant case, as defense counsel pointed out to the military judge, the defense fully expected that the judge would decline to give the proposed instruction. *Transcript*, at 356-57.

There had already been a pretrial hearing, at which the judge had made it clear that his analysis of *the law* was quite different from that of the defense. Disagreements as to principles of law do not raise any concern as to inconsistent assertions of fact, and therefore, the military judge's expressed concern about an inconsistency in this case was entirely unfounded and without merit.

It is well-settled that the declaration of a mistrial "is a drastic remedy and should be granted only where the circumstances demonstrate 'a manifest necessity to terminate the trial to preserve the ends of public justice.'" *See, e.g., United States v. Dennis*, 16 M.J. 957, 965 (A.F.C.M.R. 1983); *United States v. Jeanbaptiste*, 5 M.J. 374, 376 (C.M.A. 1978). For example, where the receipt of improper evidence can be "neutralized by other means," a declaration of mistrial is not required. *Id.*

"Even when there are circumstances which raise serious doubt regarding the fairness of the proceedings, the trial judge must, before granting a mistrial, determine that an alternative measure, less drastic than mistrial, would not alleviate the problem so as to allow the trial to continue to an impartial verdict." *United States v. Ghent*, 21 M.J. 546, 550 (A.F.C.M.R. 1985). "[T]he prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one." *Arizona v. Washington*, 434 U.S. 497, 505, 98

S.Ct. 824, 54 L.Ed.2d 717 (1978).

Where there *are* other alternatives to declaration of a mistrial, the declaration of mistrial is a judicial abuse of discretion and double jeopardy bars a retrial.

In the instant case, even assuming for the same of argument that the military judge was correct in his determination that he had to reject the Stipulation of Fact and set aside the Pretrial Agreement, he gave absolutely no thought to any other alternative way of dealing with the situation other than declaration of a mistrial.

The judge recognized that once the stipulation was set aside, the government would have no evidence on several of the charges because it would be caught without many of the witnesses it needed to establish the offenses. The judge did not even pause, however, to consider the possibility of recessing the trial, and resuming it at a later date when the government would have its witnesses available to testify.

After eliciting the defense position that it was opposed to a mistrial, the judge simply announced that the court's calendar was open on the week of March 19, 2007:

MJ: Defense, do you want to be heard?

CC: Yes. We would oppose the motion.

MJ: Counsel, I have the week of 19 March available.

Transcript, at 374. There was absolutely no consideration of any other alternative besides declaration of a mistrial. The possibility of a trial continuance was never discussed.

This failure to recognize the viable alternative of a continuance is particularly egregious since the judge actually asked the Government if its witnesses would be available the week of March 19, 2007, and received an affirmative answer:

> MJ: At this point I won't set it for May 7th, I will set the initial date. And then I'll adjust, as every court does, for good cause shown. If you have a legitimate conflicts [sic]. That's just how the system works. ***Government, would you have your witnesses available the week of 19 March?***
>
> TC: ***Yes, Your Honor. I believe the Government can arrange witnesses for March 19th.***

Transcript, at 375 (emphasis added).

Thus, there was no consideration of the possibility of recessing and continuing the trial to the week of March 19, 2007. Indeed, the only reason the judge focused on the week of March 19th was that that week was open on the court's calendar.

It is entirely possible that the Government might have been able to get their witnesses into court much faster than that. Perhaps only a one or two week continuance would have been required. The answer will never be known because in his rush to simply declare a mistrial without considering any other alternative, the military judge never inquired at all about the possibility of a continuance, and never asked the Government when the earliest possible availability of its witnesses might be.

The military judge appears to have believed that Lt. Watada was confused, or that he somehow did not appreciate or understand the effect of his stipulation, even though counsel for both sides assured him there was ***no*** problem with the stipulation. Counsel for the accused told the military judge, "*there is nothing in the stipulation that is contradicted by the instruction that we're offering to you.*" *Transcript*, at 356.

When the judge pressed Trial Counsel to disagree, Trial Counsel replied simply, "*Government tends to agree that there is no contradiction in the stipulation.*" *Id.* The military judge continued to hammer away at counsel for the Government, and asked again if he did not see the inconsistent positions that the accused was taking. But Trial Counsel continued to assert that he did not see any problem, stating simply, "Your Honor, I don't see it." *Id.* at 366-67. Government counsel repeatedly agreed with civilian defense counsel, and repeatedly told the judge that he did not see any reason why the Stipulation of Fact was improper.

The judge simply declared a mistrial, without asking either party if they preferred for him to grant a continuance to give the Government a chance to assemble the witnesses needed to attest to the facts that had been covered in the Stipulation of Fact which the judge was now suddenly rejecting. In fact, the court never solicited any suggestions as to ***any*** other alternative to his declaring a mistrial.

Although Rule 915(a) specifically directs a military judge to consider the possibility of declaring only a *partial* mistrial, in this case the military judge never did this. The judge simply assumed that ***no*** part of the stipulation could be salvaged.

The Stipulation of Fact was entered into in exchange for the Pretrial Agreement, which called for dismissal of two of the four Conduct Unbecoming an Officer specifications. The military judge simply assumed that if the stipulation as to facts pertaining to the missing movement charge was rejected, that the parties would not want to adhere to any other part of their agreement.

It is entirely possible that notwithstanding invalidation of that part of the stipulation dealing with the missing movement charge, the Government and the defense might have been able to reconfigure the Stipulation in a manner that might have satisfied their purposes and satisfied the military judge that the outcome was just. In sum, there was never ***any*** consideration given as to whether it was truly necessary to declare a mistrial.

Not only was there no "high degree" of necessity for declaration of mistrial, *Arizona v. Washington*, *supra*, 434 U.S. at 506, there was absolutely ***no*** necessity at all.

It is important to note that even before the military judge committed himself to a declaration of a mistrial, Petitioner's Civilian Counsel put the judge on notice of the double jeopardy issue, and that a subsequent retrial might be barred. *Id.* at 359. Nonetheless, the military judge ignored the warning, and was undeterred.

III. CONCLUSION

For the reasons stated above, the accused urges this Court to grant his application for an immediate stay of the proceedings, so that this urgent matter may be decided by the appellate courts without his having to suffer the very evil of an unnecessary and impermissible second trial the Double Jeopardy Clause and Article 44(a) of the UCMJ were designed to avoid.

Additionally, the accused urges this Court to grant his motion to dismiss all charges on the grounds that they are barred by double jeopardy, since the military judge abused his discretion and the mistrial was declared without the required manifest necessity.

DATED this 14th day of May, 2007.

CARNEY BADLEY SPELLMAN, P.S.

By [signature]
James E. Lobsenz, WSBA No. 8787
Kenneth S. Kagan, WSBA No. 12983
Of Attorneys for Petitioner

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IN THE UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

First Lieutenant Ehren K. Watada,
United States Army,

Petitioner,

v.

Lieutenant Colonel John M. Head, Military Judge, Lieutenant General Charles H. Jacoby, Jr., I Corps, Fort Lewis, Washington (Convening Authority for General Court-Martial), the United States Army, and the United States,

Respondents.

RENEWED PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF PROHIBITION, AND, ALTERNATIVELY, MOTION FOR RECONSIDERATION, AND **APPLICATION FOR STAY OF PROCEEDINGS**

Army Misc. Dkt. No. _________;

Army Misc. Dkt. No. 20070535;

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

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I. PREAMBLE

COME NOW the undersigned defense counsel on behalf of the Petitioner, and, pursuant to Rules 2(b) and 20 of this Court's Internal Rules of Practice and Procedure, petition this Honorable Court to grant a Writ of Prohibition to order the military judge to dismiss with prejudice all charges pending against Petitioner, as a second trial would violate Petitioner's right to be free from a second trial for the same offenses.

In the alternative, pursuant to Rule 19 of this Court's rules, Petitioner moves for reconsideration of this Court's denial of his first Petition, on the grounds that the reason given for previously declining to take up that first Petition no longer exists.

Petitioner previously submitted a similar Petition, filed in this Court on 17 May, 2007, which resulted in this Court issuing a partial stay of proceedings on 18 May, 2007. The Court directed the Government to show cause, within ten days, why the requested relief should not be granted, and authorized Petitioner to reply to the Government's response.

In the interim, while the effect of this Court's Order was to allow the pretrial litigation to proceed, the partial stay prohibited the assembly of a court-martial panel until further Order of the Court.

On 29 June, 2007, apparently concluding that the Petition was premature, this Court declined to exercise its discretion to review the merits of the Petition and vacated the partial stay in favor of the motion to dismiss on double jeopardy grounds being directed to the military judge for a ruling.

On 2 July, 2007, Petitioner submitted a written motion to dismiss to the military judge, who took the written motion (and the Government's response) under advisement. That Motion is annexed hereto as Appendix A. The matter was argued before the military judge on 6 July, 2007. At the conclusion of the argument, the military judge advised the parties orally that the motion was denied, and followed his oral ruling with a written ruling, entered on 11 July, 2007. That Order is annexed hereto as Appendix B.[1]

This Petition is supported by the accompanying "Brief in Support of Renewed Petition for Extraordinary Relief in the Nature of a Writ of Prohibition," and the accompanying "Application for Stay of Trial Proceedings."

A. THIS COURT SHOULD EXERCISE EXTRAORDINARY WRIT JURISDICTION AT THIS TIME

While it is true that Rule 20.1 of this Court's Internal

[1] In addition to considering the argument on the motion to dismiss, the military judge also heard argument on Petitioner's Motion seeking disqualification of the military judge, which the judge denied. Further, the judge heard, but has not yet issued decisions on, substantive motions related to the First Amendment, as well as the lawfulness of the orders Petitioner received, and the lawfulness of the United States' involvement in the conflict in Iraq.

Rules of Practice and Procedure indicates that issuance by this Court of an extraordinary writ is a matter of discretion "sparingly exercised," it is likewise true that just as in the matter of *Burtt v. Schick*, 23 M.J. 140 (CMA 1986), this matter presents a unique set of circumstances that justify this Court in exercising extraordinary writ jurisdiction at this time.

One issue this Court ought to consider is the fact that Petitioner continues to be "confined," in that his term of service expired on December 4, 2006. As a result, Petitioner is compelled to remain in the service during the pendency of this matter.

While Petitioner in no way intends to equate his continued active duty service with pretrial detention or confinement, and is cognizant of the fact that his continued time on active duty would not entitle him to "credit" should there ever be a conviction and confinement ordered, there is no doubt that his time of service expired nearly eight months ago.

Moreover, while subsequent pretrial litigation, as well as a second trial, is one of the evils the Double Jeopardy Clause was intended to prevent, Petitioner has been through a subsequent round of pretrial litigation, including a lengthy motions hearing.

Just as the Court noted in *Burtt*, an additional factor this Court should consider is "the waste of time and energy that can be avoided" if the Court promptly resolves the issues before it. *Id.* at 142.

These several considerations, when considered in their totality, embody exactly the considerations the Court discussed in *Burtt v. Schick*, *supra*, wherein the Court observed:

> Ordinarily, this Court would not entertain an extraordinary writ petition unless the military judge first had been given an opportunity to rule on the double-jeopardy issue. Considering the unique circumstances of this case, however, including appellant's status in pretrial confinement and ***the waste of time and energy that can be avoided if we promptly resolve the issues before us,*** we conclude that the exercise of extraordinary writ jurisdiction at this stage of the proceedings is appropriate.

23 M.J. at 142 (emphasis added).

It is logical to infer from this Court's Order of 29 June, 2007 that the Court believed the initial Petition to have been filed prematurely, in that the issue had not been presented to the military judge, and thus this Court had no record before it to evaluate the military judge's reasoning.

If that inference is correct, Petitioner notes that in response to this Court's 29 June, 2007 Order, Petitioner presented his double jeopardy dismissal motion to the military judge, who denied the motion and issued a written ruling in support of his decision. Thus, the apparent reason given by this Court for denying the first *Petition for Extraordinary Relief* – failure to present the argument to the military judge presiding over the continued proceedings -- no longer exists. Petitioner's request for extraordinary relief is ripe and is properly before this Court.

Petitioner asks this Court, on reconsideration, to now address the *merits* of the Double Jeopardy claim which he raised in his first Petition, and to grant the requested relief by prohibiting the scheduled second trial. Petitioner asks this Court to grant his motion to dismiss all charges and specifications on the ground that any retrial would violate the prohibition against double jeopardy, as Respondents have failed to carry their heavy burden of showing that the declaration of a mistrial at the first trial was supported by the required manifest necessity.

II. STATEMENT OF THE CASE

A. THE CHARGES

On November 9, 2006 the Convening Authority at the time, Lt. General James Dubik, approved the referral of three charges to a general court-martial. The accused was charged in Count 1 with Through Design Missing Movement Required in the Course of Duty (Article 87), alleged to have been committed on June 22, 2006; in Count 2 with one Specification of Conduct Unbecoming an Officer (Article 133), alleged to have been committed on August 12, 2006; and in Count 3 with three Specifications of Conduct Unbecoming an Officer (Article 133), alleged to have been committed on June 7,

2006. *Appellate Exhibit XV.*

B. COMMENCEMENT OF THE TRIAL

An Article 39(a) pre-trial hearing commenced on January 4, 2007, and was completed on that same date.

The court-martial reconvened for trial on February 5, 2007. The Court was apprised that the parties had entered into a Stipulation of Fact on January 26, 2007. The military judge reviewed the stipulation and stated that he felt obliged to conduct a *Bertelson*[2] inquiry on the record. ROT, *Transcript* 2/5/07, at 103. The following inquiry was conducted on the record:

> MJ: …Lieutenant Watada, I have before me prosecution Exhibit 4 for identification, a Stipulation of Fact. Do you have a copy of that in front of you?
>
> ACC: Yes, sir.
>
> MJ: It is a 12 page document with apparently a DVD – or 2 DVDs. Do you have that?
>
> ACC: Yes, sir.
>
> MJ: Turn to page 12. [The accused did as directed].
>
> MJ: Is that your signature on the top of Page 12?
>
> ACC: It is, sir.
>
> MJ: Did you read this document before you signed it?
>
> ACC: Yes. I did, sir.
>
> MJ: Do counsel for both sides agree to the stipulation and is that your signature or your

2 *United States v. Bertelson*, 3 M.J. 314 (C.M.A. 1977).

predecessor's signature that appears on the document?

TC: Yes, sir.

CC: It is also my signature, and I signed it for Captain Kim at his direction.

MJ: Lieutenant Watada, a Stipulation of Fact is an agreement among the trial counsel, your defense counsel, and you that the contents of the stipulation are true, and if entered into evidence, are the uncontradicted facts in this case. No one can be forced to enter into a stipulation, and no stipulation can be accepted without your consent, so you should enter into it only if you truly want to do so.

Do you understand that?

ACC: Yes, sir.

MJ: Are you voluntarily entering into this stipulation because you believe it is in your best interest to do so?

ACC: I am, sir.

MJ: Lieutenant Watada, the government has the burden of proving beyond a reasonable doubt every element of the offense to which you've been charged. By stipulating to the material elements of one of the offenses, as you are doing here, you alleviate that burden; that means, based upon the stipulation alone and without receiving any other evidence the court can find you guilty of the offenses to which the stipulation relates.

Do you understand that?

ACC: I do, sir.

MJ: If I admit this stipulation into evidence it will be used in two ways.

First, members will use it to determine if you are in fact, guilty to the offenses to which the stipulation relates.

Second, the trial counsel may read the contents to the members, and they will have it with them when they decide upon your sentence.

Do you understand and agree to these uses of the stipulation?

ACC: Yes, sir.

MJ: Do both counsel agree to these uses?

TC: Yes, Your Honor.

CC: Defense agrees.

MJ: Lieutenant Watada, a Stipulation of Fact ordinarily cannot be contradicted. You should, therefore, let me know if there is anything whatsoever in the stipulation you disagree with or feel is untrue.

Do you understand that?

ACC: Yes, sir.

MJ: At this time I want you to read your copy of the stipulation silently to yourself as I read it to myself.

[The accused did as directed].

MJ: Have you finished reading it?

ACC: I have, sir.

MJ: Have you had an opportunity to review also the material contained in Enclosure 1 and Enclosure 2, the two videos?

ACC: I have seen the videos, sir.

MJ: And those are the videos of the two statements that are reflected in the Stipulation of Fact?

ACC: Yes, sir.

MJ: Lieutenant Watada, is everything in the stipulation the truth?

ACC: It is, sir.

MJ: Is there anything in the stipulation that you do not wish to admit that it's true?

ACC: No, sir.

MJ: Lieutenant Watada, have you consulted fully with your counsel about the stipulation?

ACC: Yes, sir.

MJ: After having consulted with your counsel, do you consent to my accepting the stipulation?

ACC: Yes, sir.

Id. at 126-29.

The military judge then asked a series of questions to ensure that there was a factual basis for the stipulation. *Id.* at 129-133. In the process of that questioning, it became evident that the stipulation used the wrong date and the wrong place for one of the verbal statements the accused was charged with making. *Id.* at 131-132. Changes were made to effect corrections as to the date and place of that particular statement. *Id.* at 131-132.

The judge asked the accused several more questions, including specific questions about his failure to report for deployment to Iraq. The accused stated on the record that he did not deploy because he believed the war in Iraq to be illegal:

MJ: What was your intent regarding deployment of that aircraft?

ACC: Sir, my intent, as I stated in public statements and as I stated to my chain of command numerous times, was that ***the order to deploy to Iraq to support combat operations in OIF was to me,*** as I believed in the facts and evidence that I saw, ***was an illegal order***. And that ***the war itself was illegal, and any participation of mine would be contrary to my oath***, and therefore I would have no other choice but to refuse. So my intent was to refuse the order, sir.

Id. at 134-35 (emphasis added).

The court asked if either counsel believed that any further inquiry into the factual basis for the stipulation was necessary. *Id.* at 139. Trial counsel asked for further inquiry to establish the fact that the aircraft in question did actually leave without the accused. The court inquired further and the accused said that he had no doubt that the plane did leave and he was not on it. *Id.* Trial counsel then expressed satisfaction with the record. *Id.* at 140. The court again asked if either counsel believed that any further inquiry was necessary and both counsel replied that they did not. *Id.*

The court then took up the Pretrial Agreement, which was marked as Appellate Exhibit XXXII. *Id.* at 140. In a lengthy colloquy, the court established that the accused had signed the Agreement; that he understood its contents; that no one forced him to enter into it; that it contained the entire agreement between the parties; and that the Exhibit was the full and complete agreement. *Id.* at 141-142.

Further, the accused acknowledged on the record that he had had a chance to look at the evidence, and to talk to his counsel about the Pretrial Agreement; that he wanted to enter into it; that he understood that in exchange for dismissal of Specifications 2 and 3 of Charge II he was agreeing to enter into a Stipulation of Fact; that he understood the stipulation could be used against him by the members to find him guilty; that if the members found him guilty they could use it to determine any sentence they might impose; and that an appellate court could also use it against him. *Id.* at 143-44.

The accused acknowledged that no forced him to enter into the Agreement, and that he wanted to enter into it. *Id.* at 145. He acknowledged that he understood what the Agreement meant, and that he knew he could decline to enter into it right at that very moment and simply elect to go to trial on all the charges. *Id.* at 146, 147. Lt. Watada stated on the record that he was freely entering into the Agreement because he wanted to, and that he had no doubt about doing that. *Id.* at 147-148.

Finally, the judge also discussed with the accused the fact that the Agreement could be cancelled if he brought up something "inconsistent" with the facts he had stipulated to:

> MJ: And the last way this can be cancelled is if I refuse to accept the Stipulation of Fact. How that can happen is ***if you bring up something or your counsel bring up something inconsistent with what you've stipulated to as the uncontradicted facts*** in

this case. Do you understand that?

ACC: Yes, sir.

MJ: ***That if the stipulation says, "Red," and you come in and say, "Blue," I'll have to reopen*** what we talked about earlier, ***and kind of make sure*** those - that we're still on the same sheet of music here about whether ***this is an accurate stipulation of fact.*** Do you understand that?

ACC: I understand, sir.

Id. at 148 (emphasis added).

The accused then confirmed he had had enough time to confer with his counsel, he was satisfied with his counsel's advice; he was entering the Agreement of his own free will; he had no questions to ask about the Pretrial Agreement; and he understood all the terms of his Pretrial Agreement. *Id.* at 149. The Court then admitted the Stipulation of Fact (Prosecution Exhibit 4) into evidence without objection. *Id.*

Voir dire of the panel took up the remainder of the day on February 5, 2007. On February 6, 2007, Government Trial Counsel and the accused's Civilian Counsel gave their opening statements.

The Government then proceeded to call its three witnesses (two of Petitioner's commanding officers and a Professor of Officership at the William E. Simon Center for the Professional Military Ethic, offered as an expert on military ethics and officership customs and standards).

At 15:43 on February 6, 2007, the Government rested its case. *Id.* at 353.[3]

C. **THE MILITARY JUDGE *SUA SPONTE* QUESTIONED THE WISDOM AND VALIDITY OF THE STIPULATION OF FACT**

When trial resumed the next day, February 7, 2007, the military judge announced that he had provided counsel with a draft of his proposed instructions, and that he saw as an issue involving a conflict between the Stipulation of Fact and an instruction proposed by defense counsel.

> MJ: I'm going to reopen the inquiry into the Stipulation of Fact, as a potential issue of mistake of fact has been raised by a proposed instruction by the defense, which has been marked as Appellate Exhibit XXXXV [sic].

Id. at 354. Defense counsel objected to reopening that inquiry and stated there was no justification or legal basis to do so. *Id.*

The court then inquired what the basis was for requesting the instruction, and defense counsel explained that it went to the element of intent, and was merely a reflection of the defense legal position that Lt. Watada did not act with the requisite criminal intent because his purpose in refusing to deploy was to avoid participating in what he believed to be an illegal war:

> CC: It goes to the intent element, purely to the intent element. With respect to the missing movement charge, it has always been Lieutenant Watada's position that he intended not merely to miss the movement, but to avoid participating in a war that he

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3 TC: Your Honor, at this time the government rests.
MJ: You have no more evidence to present at this time?
TC: That's correct, Your Honor.

> considered to be illegal, and that the orders to compel him to go to Iraq, in essence, were compelling him to put himself in a position where he would be supporting and engaging in war crimes.
>
> So his specific intent, which is required by the offense, was not the mere intent to miss a movement, the intent, his state of mind, was of a different character, altogether. And, we have argued that repeatedly. We have also, as you know, in the stipulation, if you look at the last paragraph – sorry, the last sentence of the first paragraph, it says it there, and you approved this language, "With this stipulation, however, the defense does not waive any future claim with regard to the motions previously litigated."
>
> MJ: Correct.
>
> CC: Now, you have ruled, we believe erroneously, that the order given to him was legal. We are submitting this particular instruction again, to further highlight our argument that the order was not legal, and that the intent, which Lieutenant Watada had, was not the intent which is required for the purposes of this offense. And there is nothing in that stipulation as to his intent, only that he knew and that he missed movement and that he acted intentionally with a general intent. But there is nothing in the language of that paragraph, which was very carefully drafted between myself and prior trial counsel, with regard to anything that's raised by the instruction…

Id. at 354-55.

The judge asked the Government what its position was and Trial Counsel responded that he opposed the giving of the proposed defense instruction because he disagreed with defense counsel's position as to the type of intent required to violate Article 87:

> TC: Your Honor, first, in regards to the intent

> element, I will disagree with it. The accused had the intent to miss a movement. The defense counsel would like to place the additional element in there; that he intended to not participate in what he termed, "an illegal war." That's not, in anywhere enumerated, in Article 87. The intent is the intent to miss the movement. The accused intended to miss the movement. His personal thoughts on the legality or the illegality of the war are irrelevant to the Article 87 offense.

Id. at 356.

Defense counsel acknowledged that they had a difference of legal opinion as to the type of intent required, and asserted that just because they disagreed as to a point of law, that did not mean that the defense proposed instruction conflicted in any way with their stipulation as to the facts. *Id.* at 356. When the court asked the government for its response, Trial Counsel ***agreed*** with defense counsel that there was no defense contradiction with the previously accepted Stipulation of Fact:

> CC: And we understand that [the Government's position on the type of intent required]. I'm not attempting to put words into the Government's mouth but we obviously dispute that issue. We have a difference of opinion. And that's why we can raise that issue in the stipulation. But that has been our argument and ***there is nothing in the stipulation that is contradicted by the instruction that we're offering to you.***
>
> MJ: Government?
>
> TC: ***Government tends to agree that there is no contradiction in the stipulation***. We just absolutely disagree that this should even be an issue at this point. The court has previously ruled that the order was lawful, and the accused clearly intended to miss movement.

Id. at 356 (emphasis added).

The Court then stated that he was going to reopen the inquiry into whether to accept the Stipulation of Fact (which had already been accepted, and published to the members of the panel), because the accused persisted in believing that he had a legal defense, notwithstanding the Court's legal ruling that he did not:

> MJ: That's where I'm having a problem here. I feel I need to reopen the inquiry as to your client's understanding of the Stipulation of Fact and whether there is a material misunderstanding and whether he believes that there is a defense because he has stipulated to all of the elements.
>
> CC: He does believe there is a defense. We tried to raise that defense by motion and you rejected those motions. And my assumption is, consistent with your rejection of those motions, that you will reject this instruction. But we are offering it consistent with the prior motions that we raised, because his state of mind was of a different nature than what the government contends is inadequate for the purposes of this charge. And that's the only disagreement we have.
>
> There is no disagreement with any of the language contained in paragraph 4. We agreed to stipulate to that so that it would make the government's case easier in terms of not having to bring people and introduce documents, as they've done at prior proceedings to show that he didn't get on the plane; that he received the order, and that he knew what he was doing when he didn't get on the plane.
>
> MJ: I'm going to reopen the inquiry.

Id. at 356-57.

Defense counsel asked what would happen if the accused refused to answer the judge's questions and the judge said that if that happened, the Court would then reconsider admission of the stipulation. *Id.* at 358. Moreover, the judge noted that if he rejected the stipulation, then the Government would lose that evidence in support of its charges, and at that point a mistrial would be appropriate:

> CC: Are you directing him to answer the questions?
>
> MJ: ***If he does not want to answer the questions, then I will reject the stipulation*** because I cannot resolve, in my mind, that there is not an inconsistency here.
>
> CC: And then what happens?
>
> MJ: ***Then I reconsider the admission of Prosecution Exhibit 4.*** It now becomes Prosecution Exhibit 4 for identification. Under Paragraph 5 of the pretrial Agreement, "It may become null and void on the occurrence of any of the following events" and paragraph C is "The refusal of the military judge to accept the stipulation of fact."
>
> ***At that point, government has no evidence –***
>
> * * *
>
> MJ: ***...And since the government has no evidence at this point a mistrial would be in order. And I would set a new trial date***, because the government has dismissed two charges, based upon this pretrial agreement. They're entitled to their bargain, as much as your client is entitled to his bargain. ***That's what will happen.***
>
> CC: Colonel, let me just say, I would assume that if that were to happen, you would allow us sufficient time to appeal from that order ***because jeopardy has attached, and it may very well be that the retrial is impermissible.*** If that's the case, then we would need do discuss this and make some decisions. But, I would

assume that that also would follow.

MJ: I would set the trial date and what actions you take with any superior court is well within what you want to [sic].

Id. at 358-59 (emphasis added).

At this juncture, defense counsel asked for a recess, and that request was granted. *Id.* at 359. When court reconvened, the accused stated that he did not object to answering the judge's questions. *Id.* The Court proceeded to remind Lt. Watada that he had previously told him that he could revoke the Stipulation of Fact if he stipulated to one fact and then later contradicted that factual admission:

MJ: Please turn to page 7. Do you recall our conversation at the beginning of the trial when I talked to you about if I thought there might be a matter that might be inconsistent with what we've discussed, and that I may have to clarify that matter in the stipulation of fact? Do you remember that conversation?

ACC: Sir, inconsistent with what I stipulated to in the facts?

MJ: Yes.

ACC: Yes, sir.

Id. at 361 (emphasis added).

The judge asked the accused again what it meant to him when he stipulated that he intentionally missed the movement of his unit, and Lt. Watada again responded that it meant that he deliberately refused to deploy because he felt he could not participate in an illegal war:

MJ: We discussed that during the pretrial discussion of the pretrial agreement portions. Do you remember that?

ACC: I remember, sir.

MJ: Taking a look at Paragraph 4 of the Stipulation of Fact on Page 7. What does it mean that you intentionally did not aboard [sic] the aircraft?

ACC: Your Honor, in that sentence, paragraph 4, what I was saying is that I intentionally missed the movement because ***I believed my participation in the war in Iraq would contribute to war crimes, and it would be contributing to what I believed an illegal war.***

MJ: So when you talk about you intentionally missed this movement, ***did you believe you had a duty*** to make that movement?"

ACC: Your Honor, ***no. I did not feel I had that duty, because I was being ordered to do something I felt was illegal***.

MJ: I'm not trying to trick you or trap you in any way. I just want to know what you think.

ACC: I understand.

MJ: What you think this paragraph means.

ACC: Yes, sir.

MJ: Do you believe you have a defense to missing movement?

ACC: Your Honor, ***I have always believed***, especially at this point in time, ***that I had a legal and moral defense. I realize*** that the government has made arguments contrary to that, and ***that you've also made rulings contrary to that. It still does not negate my belief*** that I still have a defense.

MJ: Understand. I'm not trying to force you to make any decision that force [sic] you to enter into this stipulation. You should only enter into this stipulation if you truly want to do so. Do you understand that?

ACC: I do sir.

MJ: Do you believe that paragraph 4 admits every element of the offense of missing movement?

ACC: Sir, no, it does not. Because I had a specific reason for what I intended to do and that was as I stated earlier.

MJ: That's where I'm having a problem reconciling that you intentionally did not aboard [sic] the aircraft, because if you had no duty to board the aircraft, why would you intentionally not board the aircraft. If you believed you did not have a duty to do so, regardless of whether it's a legal duty or not, what did you believe?

ACC: Your Honor, I did not board the aircraft out of negligence or because I thought it was a mistake. It's because I felt that what I was being asked to do - by intentionally missing the movement, I could not take part in it.

MJ: I'm going to read you what we covered back in the first session on Monday and I want you to explain to me what you think this meant to you, when I read, "Lieutenant Watada, the government has the burden of proving beyond a reasonable doubt every element of the offenses with which you are charged. By stipulating to the material elements of the offense of missing movement, as you are doing here, you alleviate that burden. That means based upon the stipulation alone and without receiving any other evidence this court can find you guilty of the offense to which this stipulation relates. Do you understand that?" And you told me that you did. What does that mean to you because you stipulated to every element of the offense of missing movement by design?

ACC: Sir, yes, I do understand that I stipulated, and I believe - I understand the arguments that the prosecution was making. But I also understand that

> there is additional evidence that could go to my defense.

Id. at 362-64 (emphasis added).

The Court inquired of defense counsel whether he believed that the Stipulation of Fact was a confessional stipulation, and defense counsel replied he did not:

> MJ: Defense, do you believe that this stipulation is a 'confessional stipulation' as contemplated by Rule for Court Martial 811?
>
> CC: As far as it goes, it is a stipulation of fact, which was intended to relieve the government of proving certain facts; however, ***it has always been our position that Lieutenant Watada has a defense*** based upon the motions that we raised earlier, which you precluded us from raising at trial, and we are not altering our position in that respect, nor did we alter it in this stipulation, ***as I pointed out to you in the preparatory paragraph in the last sentence which says that this stipulation is being made subject to prior arguments and without waiving those arguments.***
>
> MJ: That's a completely different matter, then. Do [sic] believe that this is the [sic] confessional stipulation, as contemplated by Rule for Court Martial 811?
>
> CC: I believe that you and the government could interpret it as that and that the government could argue, based upon this stipulation, that they don't have to prove anything further based upon their theory of the case. ***Our theory of the case is somewhat different.***
>
> MJ: Thank you. Government, did the Convening Authority believe that this was a confessional stipulation of fact? Was that presented to him in that manner?
>
> TC: Your Honor, honestly, right now, I'm - of course, I'm a representative of the Staff Judge

> Advocate. I did not present this to the Convening Authority, nor was I present when this issue was presented.
>
> MJ: What I'm asking is did the government enter into this stipulation and into this pretrial agreement, believing you had a confessional stipulation of fact; believing that there was any - as to Charge 1, that there was any material fact not admitted?
>
> TC: Your Honor, we believe that Paragraph 4 provides evidence of every material fact in Article 87. In other words, we have evidence to prove every element in Article 87. ***We understand the defense's position that they believe they have a defense. Obviously we disagree.*** But, we believe that we have met our burden by -

Id. at 364-65 (emphasis added).

Shifting his focus from the Stipulation of Fact to the Pretrial Agreement, the Court expressed its concern, but neither counsel agreed with the Court, that there was a failure to have a "meeting of the minds":

> MJ: …[W]where I am having problems is - are we - ***I'm not seeing that we have a meeting of the minds, here.*** And like any contract, if there is not a meeting of minds, there is not a contract. Tell me where I'm missing something, government? I'll let you answer in just a minute, defense.
>
> TC: In terms of the four corners of this agreement, ***I think there is a meeting of the minds. I think both parties agreed*** to the contents of Paragraph 4 of the Stipulation of Fact. That goes to the "what" of the offense.
>
> The defense would want to raise the issue of "why" as a defense, and we would object to that. But in terms of what's contained in agreement, ***I think - obviously, let the defense chime in, but believe there was a meeting of the minds.***

Id. at 365-66 (emphasis added).

The Court asked the Government if the accused had not "set up matters" inconsistent with the Stipulation of Fact, but the Government responded that it did not think so:

> MJ: Counsel, under *Bertelson*, don't you have to do, essentially, a care [sic] inquiry[4] with the accused?
>
> TC: That's correct. And that's also set forth in *Enlow* but -
>
> MJ: Did he not - ***has he not set up matters inconsistent with*** - he believes he has a defense to what he has stipulated to in a confessional stipulation. Whether it is a valid defense or not, government, isn't the point.
>
> TC: ***Your Honor, I don't see it.*** I mean, the subjective beliefs of the accused and that he has a defense are irrelevant.
>
> MJ: Counsel, it's just like if he pled not guilty, but as to this offense, you have to treat it essentially like a guilty plea, because he admits to all the facts surrounding the offense. That's what *Bertelson* is about. That's what all that case law is about. It's so you don't shortcut the system.
>
> TC: ***Your Honor, I don't see how this is short cutting the system.*** In another case, the accused can plead to the elements of the crime and then still get up and say, "But I have a reason." He has pled not guilty to the offense.

Id. at 366-67 (emphasis added).

The Court asked if defense counsel wanted to be heard, and defense counsel attempted to explain to the Court that there was no inconsistency between a Stipulation of ***Fact*** and a legal theory or a legal conclusion, which the Court disagreed with.

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[4] What was likely intended here was a reference to the type of inquiry

> CC: …***This is a stipulation; it's not a guilty plea.*** It's a stipulation of facts. That is to be judged differently. ***The impact or the effect of the stipulation, the parties can disagree about.*** And we apparently do disagree, but Lieutenant Watada's pleading not guilty. He's always made that clear. And yet, he is willing to plead to the facts which he understood could be sufficient on which to find him guilty, as you instructed. He knows that based upon the legal rulings and determinations the court makes. But he still maintains, notwithstanding those rulings, that he is entitled to plead not guilty for the reasons that he has stated to you.
>
> MJ: What does "uncontradicted" mean? What uncontradicted material facts? He's essentially pled guilty to missing movement by design by admitting to every fact necessary.
>
> CC: ***That's a legal conclusion,*** which you're drawing, and which you may be entitled to draw, subject to whatever legal rulings you make. ***It's not a legal ruling which we agree with and it's not a conclusion that we will draw no matter how much you argue to us about it we will not draw that conclusion,*** and we will also appeal it, if necessary.
>
> MJ: I'm just trying to understand how his subjective belief fits into this because he's raising that he doesn't believe he intentionally missed the movement.
>
> CC: What he's said to you in his answers to your questions is that the act of not getting on the plane was not a mistake. He did that deliberately. But ***he did it for a specific reason out of a specific intent with which the government does not agree and which the Government deems to be irrelevant and which you have ruled is irrelevant.*** That's all he is saying. And he's made that argument from the beginning, long before he actually failed to get on the plane. That's simply our position.

Id. at 367-68 (emphasis added).

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required by *United States v. Care*, 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969).

The judge asked Trial Counsel if he understood the Court's problem and Trial Counsel candidly said he did not:

> MJ: Do you understand my problem, government, with this?
>
> TC: Frankly, Your Honor, no.

Id. at 368.

D. THE MILITARY JUDGE'S ACTIONS APPEARED TO BE AN ATTEMPT TO COMPEL GOVERNMENT COUNSEL TO SEEK A MISTRIAL, DESPITE ITS OBVIOUS MISGIVINGS

After vainly trying one more time to get counsel for the Government to agree with him, the Court again stated that it was contemplating declaring a mistrial:

> MJ: At this point I'm thinking we're going to have to reset a new trial date and those other charges will come back. Why don't we take 15 minutes…And when we come back, I'll make my ruling.

Id. at 369.

When court reconvened, the judge asked defense counsel and Government counsel one more time if they could not see that the Stipulation of Fact was a confessional stipulation, but both again did not agree with the court:

> MJ: Mr. Seitz, defense counsel, one more time: Do you believe that Prosecution Exhibit 4 is a confessional stipulation, as to Charge 1?
>
> CC: ***No, I do not. I believe it's a stipulation of fact.***
>
> MJ: Government, I understand you needed some more time. Have you had enough time? Did you have the time that you needed?

> TC: We did, Your Honor. Thank you. ***The government concurs, and believes this also to be a stipulation of fact.***
>
> MJ: Does it not cover every element of the offense? Is this not a confessional stipulation of fact? How can I accept a confessional stipulation of fact under *Bertelson* where the defense doesn't concur that it's a confessional stipulation of fact?
>
> TC: The government's understanding is that it is a stipulation of fact; the accused has not pleaded guilty to the offense and ***if he [has] evidence to present that would be able to prove that he is not guilty of the offense, then the court should hear that evidence.***

Id. at 370-71 (emphasis added).

When counsel for the government reiterated that he agreed with defense counsel, the Court simply announced that it was rejecting the Stipulation of Fact, and asked the Government if it wanted to move for a mistrial:

> TC: Your Honor, I don't know what else to say other than what's already been said. ***The parties agree about the contents of the stipulation – the parties agree that it is a stipulation of fact.***
>
> MJ: That's not the issue. ***At this point I'm reconsidering Prosecution Exhibit 4 and rejecting the stipulation of fact.*** It's now Prosecution Exhibit 4 for identification, as the government has closed its case. ***Government, do you wish to reopen your case, or*** do you wish, as we now have a material breach of the pretrial agreement, ***do you wish to request a mistrial because at this point we don't have evidence on every element?***

Id. at 371 (emphasis added). At that point, Trial Counsel asked for another recess, and that request was granted. *Id.* at 372.

When Court reconvened again, the judge asked defense counsel on the record if the accused wished to withdraw from the Stipulation of Fact, and defense counsel stated he did not. At this point the Court again asked if the Government wished to move for a mistrial, and this time the Government acceded to the Court's request and made a mistrial motion:

> MJ: During a very brief 802…I stated…***I deem this to be a confessional stipulation of fact, that they would have the opportunity to withdraw from it, if they wish***. Does that accurately summarize the contents of the 802 session?
>
> TC: Yes, sir.
>
> CC: It does accurately summarize the discussion we had, and I would advise the court that ***we do not wish to withdraw from this stipulation***.
>
> MJ: Government, what is your druthers? At this point, ***I certainly entertain a motion for a mistrial and I'll set a new trial date***. At this point, I believe there is a breach of the pretrial agreement, which would allow the government to resurrect the additional charges that were dismissed because we have not reach [sic] the determination point, as required, for a dismissal with prejudice. I believe the government was, at 802, asking about the attempt [sic] element that's in there. But if you review the entirety of the stipulation of fact, that I think even a casual reading of the stipulation – every statement in there goes to the, "I do not intend to deploy." I don't know how we get around that. What we're left with is I can instruct the members, if the government wishes to go forward. I know the government does not have all of their witnesses that they would have called for the other offenses. ***So government, what's your choice***?
>
> TC: Your, Honor, ***at this point, the Government moves for mistrial***.

Id. at 373-74 (emphasis added).

The Court then asked for the defense position, and the defense stated its opposition to declaration of a mistrial.

Without considering ***any*** other alternatives, the Court then instantly declared a mistrial and proceeded to set a new trial date:

> MJ: Defense, do you want to be heard?
>
> CC: Yes. ***We would oppose the motion.***
>
> MJ: Counsel, I have the week of 19 March available.
>
> CC: Can we first determine, are you declaring a mistrial?
>
> MJ: ***I'm going to declare a mistrial.***

Id. at 374 (emphasis added).

E. THE MILITARY JUDGE'S CONFUSION ABOUT THE SIGNIFICANCE OF THE STIPULATION OF FACT, AND HIS REFUSAL TO CONTEMPLATE THE VIEWS OF COUNSEL FOR BOTH PARTIES, CAUSED HIM TO ABUSE HIS DISCRETION

The judge declared a mistrial after erroneously concluding that he had to reject the accused's Stipulation of Fact, which he had previously accepted at the start of the trial. The judge's erroneous belief that he had to reject the stipulation was predicated upon two erroneous assumptions.

First, he mistakenly concluded that the Stipulation of Fact constituted a confessional statement. Second, he mistakenly believed that the accused made some representation that was inconsistent with the ***facts*** in the stipulation. Because the judge was mistaken in these assumptions, his conclusion that he had to reject the stipulation was flawed, and the declaration of mistrial was entirely unnecessary and constituted an abuse of discretion.

The fact that defense counsel stated that the accused was going to testify, and was going to explain why he felt he had an obligation ***not*** to comply with the order to move, also demonstrates that the stipulation was not a confessional statement.

Since it was not a confessional statement, there was no need to conduct any *Bertelson* inquiry at all, and thus no need to declare a mistrial based on the erroneous perception that the accused was in some way contradicting a confessional statement of fact by proposing a jury instruction.

The military judge mistakenly believed that his duty to seek clarification was triggered by a supposed inconsistency between the Stipulation of Fact *and a proposed jury instruction* submitted by the defense. A proposed jury instruction is not testimony. A proposed jury instruction is simply one party's assertion of what the governing law is.

Because an assertion as to what the law is can never be inconsistent with an assertion of fact, ***no*** inconsistency triggering ***any*** duty to inquire can ***ever*** be triggered. Moreover, in the instant case, as defense counsel pointed out to the military judge, the defense fully expected that the judge would